APPENDIX A

Opinion and Judgment of the U.S. Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 3440 August Term, 1993

(Argued December 1, 1993 Decided February 28, 1994)

Docket No. 93-7685 '

BRIAN CULLEN,

Plaintiff-Appellee,

against

DR. HERBERT FLIEGNER, JOSEPH RIBANDO, ROBERT QUINN, KELD ALSTRUP, BERNARD MODDER, CONSTANCE JONES PHELPS, MICHAEL SANTOIANNI and THE TUXEDO UNION FREE SCHOOL DISTRICT,

Defendants-Appellants.

B e f o r e: KEARSE, JACOBS, *Circuit Judges,* and CARTER, *District Judge.**

Appeal from a judgment entered in the United State District Court for the Southern District of New York, Brieant, *J.*,

* Honorable Robert L. Carter, of the United States District Court for the Southern District of New York, sitting by designation.

permanently enjoining a disciplinary proceeding brought pursuant to New York Education Law § 3020-a.

Affirmed.

Judge Kearse dissents in a separate opinion.

STEPHEN A. PERELSON,
New York City,
for Appellants.

ROBERT N. ISSEKS, Goshen,
New York,
for Appellee.

CARTER, *District Judge*:

This is a challenge to the method adopted by the Tuxedo Union Free School District to enforce New York State Education Law § 2031-a ("§ 2031-a"). Section 2031-a prohibits electioneering within 100 feet of a polling place during a school board election, and obligates the inspector of elections to place distance markers containing notice of the electioneering prohibition at a distance 100 feet from the polling place.[1] In the district court, Appellee did not

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[1] The complete statute reads as follows:

"§ 2031-a. Electioneering within one hundred feet of polling place prohibited; distance markers

1. At every election held for the office of trustee or member of a board of education and at every vote upon any proposition or issue in a school district where the election or vote is held at a different time from, and not during, the annual meeting of the district, there shall be conspicuously placed, by the inspectors of election, distance markers at a distance of one hundred feet

(continued...)

challenge that portion of § 2031-a establishing the 100-foot, or "campaign free," zone. Rather, he attacked the means employed by the School District to enforce the statute on the grounds that the method chosen was not the least restrictive alternative for enforcing the statute, and thereby violated the First and Fourteenth Amendments. The district court agreed with Appellee, and so do we.

I.

Appellee, Brian Cullen, is a tenured high school science teacher who has been employed by the Tuxedo Union Free School District (the "School District") for the past 18 years. The School District, along with its superintendent, Dr. Herbert Fliegner (the

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[1](...continued)

from the polling place. Such distance markers shall indicate the prohibition contained herein and shall be so placed at least one-half hour before the opening of the polls and shall remain until the polls are closed.

2. At such elections or voting held at a different time from, and not during, the annual meeting of the district, while the polls are open no person shall do any electioneering within the polling place, or within one hundred feet therefrom in any public street, or within such distance in any place in a public manner and no banner, poster or placard on behalf of or in opposition to any candidate or issue to be voted upon shall be allowed in or upon the polling place or within one hundred feet therefrom during the election. For the purposes of this section, the one hundred foot distance shall be deemed to include a one hundred foot radial measured from the entrances, designated by the inspectors of election, to a building where such election is being held. This section shall not be deemed to prohibit the board of trustees or board of education from displaying within any polling place a copy or copies of any budget or proposition to be voted upon."

N.Y. Education Law § 2031-a (McKinney 1988).

"Superintendent"), and the six members of the School District's Board of Education, are Appellants in this appeal.

On February 15, 1990, the School District filed disciplinary charges alleging that Cullen 1) in violation of previous directives, took a group of students during the weekend on an unauthorized field trip in an aircraft to conduct a scientific experiment and 2) encouraged students to expose themselves, or "moon" him, in one of his classes. There had been no previous disciplinary charges filed against Cullen. The disciplinary panel dismissed the second charge as being "of no significance," but found Cullen guilty of the first and fined him $1250. The panel indicated, however, that Cullen "is clearly a very fine teacher."

On February 13, 1992, a new disciplinary charge was filed against Cullen alleging that, despite prior directives not to do so, he ignited the aerosol spray of Binaca Breath Spray in the presence of elementary grade school students in the school cafeteria where he was serving as a cafeteria lunch supervisor. After finding Cullen guilty of this charge, the disciplinary panel suspended him for four months without pay, despite the School District's argument that Cullen should be terminated. The School District is appealing the panel's penalty decision, currently pending before the New York State Commissioner of Education.

On May 6, 1992, at the George F. Baker High School, the School District held an election for candidates for its Board of Education and for a vote on the annual budget. The Superintendent and the District Clerk, Ms. Nancy Bourke, were responsible for the conduct of these proceedings.

The School District did not place distance markers 100 feet (or at any distance) from the entrance to the High School during the course of the May 6, 1992 election. No written notice was posted advising the public of the electioneering prohibition, nor did anyone physically determine where the 100-foot campaign free zone actually ended. In the previous nine years (through 10 elections), the School District did not use distance markers—and indeed did not possess any such markers—in any of these elections.

At about 3:30 p.m. on May 6th, after his work day had ended (in accordance with the terms of the teachers' collective bargaining agreement), Appellee began to distribute copies of a flier protesting the fairness of the ongoing election and encouraging voters to vote "no" for the two incumbent Board of Education members, who were running unopposed. Appellee was positioned approximately 41 feet from the entrance door of the High School. At about the same time, a member of the School District staff advised the Superintendent of what Cullen was doing.

The Superintendent approached Appellee and requested that he remove himself from the steps of the High School because the law required that he be at least 100 feet from the entrance to the High School if he wanted to engage in any electioneering. Appellee replied that he was doing nothing wrong, that it was after school hours and the Superintendent could not tell him to do anything, and that he would not move unless instructed to do so by a police officer. The Superintendent repeated his order to move, and on Appellee's failure to do so called the Chief of Police, asking him to send an officer to the High School to instruct Appellee to move to an appropriate distance from the polling place.

At about 3:40 p.m., while the Superintendent was calling the police, Joseph Zanetti, the School District's Business Administrator, observed Appellee handing out fliers. Zanetti advised Appellee that he was not outside the required statutory distance and that he must cease distributing fliers there and remove himself. As he had done with the Superintendent, Cullen refused to move unless the police asked him to. At this point, the Superintendent returned, requested that Zanetti remain as a witness, and, in Zanetti's presence, instructed Cullen to remove himself to 100 feet from the front door of the High School. Appellee again refused to move unless ordered to do so by the police.

Police officer John J. Kelly arrived at the High School shortly thereafter, and found Appellee still handing out fliers less than 100 feet from the front of the High School. The police officer told Appellee that he could not distribute the fliers within 100 flier of the High School, and that doing so violated state law. Appellee indicated to the police officer that he was not aware of the state law

and that he would move. The police officer then indicated a spot where Appellee could stand that would be "well outside" the 100 foot zone.

The Superintendent observed Appellee at this new location for approximately 15 or 20 minutes until 4:15 p.m., at which time the Superintendent left the High School. Prior to leaving, the Superintendent told the District Clerk that there had been trouble with Appellee electioneering within the campaign free zone, and instructed her to call the police if she had any further problems.

At approximately 4:30 p.m., the District Clerk observed Appellee handing out fliers within 100 feet of the High School's front doors. After phoning the police, she advised Appellee that he could not hand out fliers within 100 feet of the entrance to the High School.

A second police officer soon arrived and gave Appellee a copy of New York State Election Law § 8-104, which sets forth an electioneering prohibition similar to the one contained in § 2031-a. Appellee agreed that the 100 foot prohibition extended from the front door of the High School, and the police officer then escorted Appellee to a point that they both agreed was beyond the 100 foot zone.

Nothing in the record establishes Appellee's whereabouts or activities, or if any prohibited electioneering occurred, between 4:30 p.m. and 8:30 p.m. At about 8:30 p.m., the Superintendent returned to the High School. While he was standing inside, one or more voters came into the High School carrying Appellee's flier and told the Superintendent that one of the teachers was handing them out at the front of the steps of the High School. The Superintendent, the District Clerk, the Business Administrator and several members of the Board of Education then went outside, and Appellee was again advised that he was violating state law and was asked to move. Appellee did not move, and the Superintendent went to call the police. It is uncertain whether a police officer came to the High School this third time.

Between 8:50 p.m. and the close of the polls at 9:00 p.m., Appellee continued to hand out the fliers at the front of the steps of

the High School. The Business Administrator approached Appellee and told him that what he was doing was illegal and directed him to leave. Appellee replied that he was beyond the 100-foot radius.

On February 26, 1993, a disciplinary panel established pursuant to New York State Education Law § 3020-a (the "§ 3020-a panel") heard charges that Appellee had violated § 2031-a on three separate occasions on May 6, 1992. After the presentation of the School District's case and over the objection of the School District's counsel, Appellee's counsel stated that Appellee had a right to seek a preliminary injunction staying the disciplinary proceeding because a First Amendment issue was involved, but that counsel would instead seek to submit to the § 3020-a panel a motion to dismiss based upon this First Amendment issue.

Ultimately, the School District's counsel agreed, and the § 3020-a panel agreed to hear the motion to dismiss based upon the constitutional claims only. Both sides briefed the issue, and Appellee's motion was denied.

After learning of the § 3020-a panel's denial of his motion, Appellee commenced this action in the district court for the Southern District of New York seeking to enjoin the disciplinary proceeding against him. Following the parties' stipulation to the relevant facts and oral argument, the district court rendered a decision from the bench. The court found that Appellants' prosecution of the charges and the commencement of the disciplinary proceeding violated Appellee's First Amendment free speech rights, and so permanently enjoined Appellants from continuing with the proceeding. Appellee had sought no money damages. Judge Brieant directed Appellants to pay Appellee's legal fees in the amount of $19,082.65. This appeal followed.

II.

Appellee contends that the School District's haphazard method of enforcement failed to provide adequate notice of the 100 foot boundary, and that therefore his conduct did not (and could not) constitute a criminal violation of § 2031-a. It follows, according to Appellee, that there was no justification for the

disciplinary proceedings instituted by the School District. We agree.

Section 2031-a explicitly requires the posting of "distance markers at a distance of one hundred feet from the polling place." N.Y. Education Law § 2031-a(1) (McKinney 1988). These markers demarcate the boundary of the campaign free zone and provide notice to the public of the prohibition on electioneering within the zone. The markers are to be set up at least one-half hour before the polls open on election day, and are to remain up until the polls close. This scheme minimizes the potential for arbitrary or discriminatory enforcement by providing to the public uniform and continuous notice of what constitutes electioneering and of where electioneering is prohibited. School officials, who otherwise lack discretion to determine whether a violation of the statute has occurred, are therefore not relied upon personally to notify the public of the existence of the electioneering prohibition or to indicate the campaign free zone's boundary.

The School District disregarded this statutory notice requirement, and, instead, adopted a method of enforcement more suited to its own convenience. Its method of enforcement provided no notice of either the parameters of the campaign free zone or the nature of the electioneering prohibition itself. Nothing was used in lieu of the distance markers, nor was any one person assigned the responsibility of monitoring the campaign free zone for electioneering violations. Moreover, the 100 foot distance from the High School has never been measured, so no School District employee even knew where the campaign free zone actually ended. In fact, there is no indication that the School District had attempted to enforce § 2031-a prior to the May 6, 1992 election.

Absent the posting of distance markers, or the functional equivalent thereof, there was no way for Appellee (or anyone else) to identify the 100 foot boundary beyond which electioneering was permitted. The Superintendent's effort to give Appellee notice of the boundary consisted of nothing more than a warning that the High School steps were within 100 feet of the polling place. Once the Superintendent had confirmed for himself that Appellee had violated the electioneering prohibition, he made no attempt either

to post notice of the prohibition or to conduct regular inspections of the campaign free zone.

The two police officers summoned to the High School also failed to advise Appellee precisely where the 100 foot line was drawn. One police officer merely indicated a spot "well outside" the 100 foot zone, and the other escorted Appellee to a point safely beyond that zone. Like the Superintendent, the police officers seemed focused only on removing Appellee from the campaign free zone, and not with the importance of notifying the public of the electioneering prohibition so as to avoid similar difficulties with Appellee or others in the future.

It is true that irrespective of where the 100 foot boundary was located, Appellee was well aware that he was inside it when he continued electioneering on the High School steps after speaking with the Superintendent and the police. At no time, however, was Appellee advised of the precise location of the 100 foot boundary. Accordingly, the oral statements did not (and could not) provide adequate notice of the restricted area so as to justify penalizing Appellee (or anyone else) under § 2031-a. Allowing notice to be conveyed in the manner employed by the School District would facilitate (i) the curtailment of Appellee's First Amendment right to express his views to the voters as near to the polling place as the statute permits; and (ii) the selective enforcement of the prohibition on electioneering.

Appellee's First Amendment interest in staking out his vantage at the 100 foot line was no less compelling than the School District's interest in ensuring that he did not cross it. Taking together everything Appellee was told by the Superintendent and the police, his only choice was to stand either *more* than 100 feet away from the polling place or *less* than 100 feet away. What he could not do, however, was exercise his statutorily protected right to stand *just* 100 feet from the polling place. The School District effectively prevented Appellee from exercising his First Amendment right to the full extent allowed under the statute (and under *Burson v. Freeman*, ___ U.S. ___, 112 S. Ct. 1846 (1992)).

The School District's method of enforcement also facilitated the arbitrary and discriminatory enforcement of § 2031-a. To the degree that the School District sought to enforce the electioneering prohibition at all, its efforts would appear to have been focused exclusively on the activities of Appellee, someone with whom the School District "had a past history of personal conflict."[2] By the time the polls had closed, the Superintendent, the Business Administrator, the District Clerk, the President of the Board of Education, the Vice-President of the Board of Education and one additional member of the Board of Education had all, alone or together, confronted Appellee over his electioneering activities. When the Superintendent left the High School at 4:15 p.m., he told the District Clerk specifically that there had been "trouble" with Appellee over his electioneering, and that she should call the police if there were any further problems.

In fact, the School District's ability to document Appellee's activities is in dramatic contrast to the virtual absence of information abouth the activities of others. The School District cannot establish whether anyone violated the electioneering prohibition prior to 3:30 p.m.—it knows only that Appellee did so approximately at that time. Further, it cannot establish whether anyone other than Appellee violated the prohibition after 3:30 p.m.—it has only documented Appellee's activities. This failure demonstrates that the School District's enforcement method is susceptible to discriminatory or arbitrary application. A government

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[2] It may be argued that Appellee himself was in a position to know if such selective enforcement actually occurred, and would have offered evidence to that effect. As the district court noted, however, "in a contested election there may have been other people standing within the 100 feet distance and speaking with each other or greeting each other or making comments." The School District's failure to provide adequate notice of the 100 foot boundary meant that no one (other than Appellee) would be warned of the electioneering prohibition and thereby inhibited from discussing the issues and promoting the candidates right up to the polling booths themselves.

body charged with enforcing a law that seeks to preserve the delicate balance between the exercise of First Amendment rights and the promotion of fair and honest elections should not be permitted to ignore safeguards designed to preserve that balance, and then, at day's end, be able to report only on the activities of a single individual with whom bad blood already existed.

In short, Appellee did not violate § 2031-a because the School District did not provide the notice required by that statute.[3] Holding otherwise would infringe upon Appellee's First Amendment (and statutory) right to electioneer 100 feet from the polling place and make possible the selective enforcement of the prohibition on electioneering.

III.

Appellants contend that the district court should have abstained from deciding Appellee's constitutional claims. The federal abstention doctrine, first enunciated in *Younger v. Harris*, 401 U.S. 37 (1971), is based on the premise that ordinarily a state proceeding provides an adequate forum for the vindication of federal constitutional rights, *Kugler v. Helfant*, 421 U.S. 117, 124 (1975), and so due deference ought to be paid the principles of comity and federalism. *Younger*, 401 U.S. at 44. *Younger* abstention applies to state judicial and administrative proceedings, so long as the state court has a means of reviewing constitutional claims. *See, e.g., Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc.*, 477 U.S. 619, 627-29 (1986).[4]

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[3] This conclusion is buttressed by the fact that no arrests were made by the police and no criminal charges were filed by the District Attorney.

[4] Before a federal court can abstain under the *Younger* doctrine, three factors must be present. First, there must be an ongoing state proceeding. *See Christ the King Regional High School v. Culvert*, 815 F.2d 219, 224 (2d Cir.), *cert. denied*, 484 U.S. 830 (1987). Second, an important state interest must be

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Nevertheless, federal courts should still afford injunctive relief to a plaintiff who successfully establishes "the kind of irreparable injury, above and beyond that associated with the defense of a single prosecution brought in good faith, that ha[s] always been considered sufficient to justify federal intervention." *Younger,* 401 U.S. at 48. Intervention would still be warranted upon a showing of "bad faith, harassment or any other exceptional circumstance that would call for equitable relief." *Id.* at 54. Generally, for such a showing to be made, the party bringing the state action must have no reasonable expectation of obtaining a favorable outcome. *See Kugler,* 421 U.S. at 126 n.6. But, a refusal to abstain is also justified where a prosection or proceeding has been brought to retaliate for or to deter constitutionally protected conduct, or where a prosecution or proceeding is otherwise brought in bad faith or for the purpose to harass. *E.g., Lewellen v. Raff,* 843 F.2d 1103, 1109-10 (8th Cir. 1988), *cert. denied,* 489 U.S. 1033 (1989) (bad faith prosecution where brought in retaliation for exercise of First Amendment rights); *Rowe v. Griffin,* 676 F.2d 524 (11th Cir. 1982) (bad faith prosecution where brought after assurances of immunity to defendant).

In such cases, a showing of retaliatory or bad faith prosecution establishes irreparable injury for the purposes of the *Younger* doctrine, *Bishop v. State Bar of Texas,* 736 F.2d 292, 294 (5th Cir. 1984); *Shaw v. Garrison,* 467 F.2d 113, 119-121 (5th Cir.), *cert. denied,* 409 U.S. 1024 (1972), and the expectations for

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[4](...continued)
implicated in that proceeding. *Id.* Third, the federal plaintiff must have an adequate opportunity for judicial review of his constitutional claims during or after the proceeding. *Id.* In his brief to this court, Appellee submitted *sub judice* that the three *Younger* doctrine factors were present, and so we assume *arguendo* that, for the purposes of this decision, they are present. Further, because we believe that the district court based its determination not to abstain upon the applicability of the "bad faith" exception to this case, we confine our affirmance to the district court's conclusion.

success of the party bringing the action need not be relevant. *See, e.g., Lewellen,* 843 F.2d at 1109-10 (injunction justified regardless of expectations where prosecution brought to discourage exercise of constitutional rights). Abstention would serve no purpose because a state cannot have a legitimate interest in discouraging the exercise of constitutional rights, *see e.g., id.* at 1110, or, equally, in continuing actions otherwise brought in bad faith, thereby reducing the need for deference to state proceedings.

Although the district court did not explicitly address the abstention doctrine in its opinion, it found that the disciplinary charges had been brought in "bad faith." We, therefore, assume that the district court concluded that the bad faith exception to the Younger doctrine was applicable. Although the specific findings in the district court's opinion were few in number, they nevertheless provide the basis for the court's apparent conclusion that Appellants sought Cullen's termination and that the charges that Cullen violated § 2031-a were brought in retaliation for the exercise of Cullen's First Amendment right to protest the school board elections.

Appellants, according to the district court, had a "past history of personal conflict" with Cullen, and their corresponding desire "to do something about" him rose to the "level of animus." More specifically, the court took note of the "charges and hearings and imposition of fines" that preceded the School District's attempt to enforce § 2031-a against Cullen. With respect to this enforcement, the district court found that Appellants had pursued Appellee in a "strictly *ad hominem*" manner, and the charges themselves, along with the disciplinary proceeding that followed, "imposed a chilling effect" on Appellee's First Amendment rights.

Presumably, it was on these findings that Judge Brieant grounded his determination that the bad faith exception to the *Younger* doctrine applied. Although the exception has been deemed a "narrow" one, *see Huffman v. Pursue, Ltd.*, 420 U.S. 592, 611 (1975), we do not find the district court's determination to be clearly erroneous. *See* Rule 52(a), Fed. R. Civ. P. Because the State of New York cannot have a legitimate interest in the disciplinary proceeding, permitting it to continue would not serve

the purposes of the *Younger* doctrine, and so the district court's decision not to abstain is affirmed.

IV.

Appellants claim that Appellee waived his right to have his constitutional claims heard by the district court. They argue that by seeking to have his motion to dismiss heard by the § 3020-a panel after the presentation of Appellants' case and by basing this motion upon alleged First Amendment violations, Appellee lost the chance to bring his First Amendment claim directly in federal court.

Article III does not confer upon litigants an "absolute right" to have all claims decided by an Article III court. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848 (1986). This "personal right" is subject to waiver, much like other personal rights that define the procedures used to try civil and criminal matters. *Id.* at 848-49; *Collins v. Foreman*, 729 F.2d 108, 120 (2d Cir.), *cert. denied*, 469 U.S. 870 (1984). Such a waiver may be either implicit or explicit, *see Schor*, 478 U.S. at 849, however, a litigant's consent to submit a claim to the jurisdiction of a non-Article III forum must be freely and voluntarily given. *Collins*, 729 F.2d at 120; *Pacemaker Diagnostic Clinic, Inc. v. Instromedix*, 725 F.2d 537, 543 (9th Cir.), *cert. denied*, 469 U.S. 824 (1984); *U.S. v. Dobey*, 751 F.2d 1140, 1143 (10th Cir.), *cert. denied*, 474 U.S. 818 (1985).

We are uncomfortable finding an explicit waiver where as here the record is devoid of the slightest indication that either Appellee's counsel or any member of the § 3020-a panel possessed an awareness that Appellee's right to have his claims heard by an Article III forum might be in jeopardy of being waived. *See Johnson v. Zerbst*, 304 U.S. 458, 465 (1938) (it would be "fitting and appropriate for [a waiver] determination to appear upon the record"); *U.S. v. Crutcher*, 405 F.2d 239, 244 (2d Cir. 1968), *cert. denied*, 394 U.S. 908 (1969) ("the preferred practice [for obtaining a waiver] would be for the court to advise the defendant of his rights . . . and, if the defendant so desires, obtain an intelligent and knowing waiver on the record"). Further, we have not been made aware of any off-the-record conversations between Appellee and any

member of the § 3020-a panel in which a waiver might have been effected, *see Polizzi v. U.S.*, 926 F.2d 1311, 1319 (2d Cir. 1991), or of any other explanation or personal recollection by any member as to why a waiver might not have appeared on the record. *See id.* at 1320-21. In essence, there is no evidence that any panel member showed an understanding that a waiver might possibly have been effected—the possibility of waiver was neither broached nor hinted at.

Appellee likewise gave no indication that his request to have the § 3020-a panel hear the motion to dismiss might have effected a waiver of his right to bring the constitutional claims directly in federal court. No questions were posed either to Cullen or his counsel to elicit or confirm whether he had consented to waive his Article III rights. Rather, his counsel stated only that Cullen sought to have the § 3020-a panel decide the motion rather than requiring him to continue further with the disciplinary proceeding or "forcing" him to bring a claim in federal court, which he stated Cullen would do if the § 3020-a panel refused to hear the motion.

Appellee, nonetheless, may have waived his right implicitly. *See Schor*, 478 U.S. at 849. In *Schor*, the Court found that Schor had effectively waived his right to appear before an Article III court after he first insisted that a common law counterclaim against him be brought in the administrative tribunal where he had already initiated a related statutory matter, and then, after losing on this counterclaim, sought to remove the counterclaim to federal court. *Id.* at 849-50.

However, unlike *Schor*, Cullen did not seek to manipulate forums or otherwise abuse the judicial process, nor, in fact, did he initially choose the non-Article III forum to hear his claim. On this basis, we cannot find that an implicit waiver was freely and voluntarily given.

V.

The district court awarded Appellee attorney's fees in the amount of $19,082.65. Part of the award was for time spent in preparation for, and attendance at, the disciplinary proceeding

against Appellee. It is this part of the award that Appellants now challenge.

The Supreme Court has emphasized that the district court has discretion in determining the amount of a fee award. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). Upon appeal of a fee award, "the reviewing court must evaluate its reasonableness with appropriate deference." *Webb v. County Bd. of Educ.*, 471 U.S. 234, 244 (1985).

A federal court may award attorney's fees to a prevailing civil rights litigant. 42 U.S.C.A. § 1988 (West Supp. 1993).[5] Attorney's fees may also be awarded for work done in a prior administrative proceeding which "'was both useful and of a type ordinarily necessary to advance'" the subsequent § 1988 civil rights litigation. *N. Carolina Dept. of Transp. v. Crest St. Community Council, Inc.*, 479 U.S. 6, 15 (1986); *Webb*, 471 U.S. at 243-44.

Appellee is not asking that all fees incurred in connection with the disciplinary proceedings be reimbursed, but rather only a "discrete portion" of the fees so incurred. *See Webb*, 471 U.S. at 243; *N. Carolina Dept. of Transp.*, 479 U.S. at 15. The district court found both "useful" and "ordinarily necessary" that portion of the work done by Appellee's counsel in preparing for and in attending the disciplinary proceeding. Further, Appellee appropriately excluded from his request those fees incurred that were particular to the disciplinary proceeding and could not be transferred to the district court action. Given the particular nexus between the work in the disciplinary proceeding for which fees were requested and the demands of the district court action, we see no reason to reverse the district court's finding that this "discrete portion" of counsel's work be reimbursable to Appellee.

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[5] The district court indicated in its opinion that Appellants had conceded that Appellee was entitled to recover his attorney's fees under § 1988.

CONCLUSION

We affirm the district court's decision permanently enjoining Appellants from bringing or maintaining any disciplinary proceedings against Appellee arising out of the events of May 6, 1992 and the district court's award of attorney's fees to Appellee.

KEARSE, Circuit Judge, dissenting:

I respectfully dissent.

Leaving aside my disagreement with the majority's hypothesis of possible selective enforcement of the prohibition against electioneering within 100 feet of the High School, a matter that is purely speculative since the plaintiff apparently has never claimed even to have seen anyone else who might have been electioneering in the area where he was, I think the majority is far wide of the mark in holding that the defendants violated the plaintiff's constitutional rights by seeking to hold him responsible for violating N.Y. Education Law § 2031-a (McKinney 1988).

First, I disagree with the majority's view that the plaintiff in this case "did not violate § 2031-a because the School District did not provide the notice required by that statute." Majority opinion *ante* at 13. Section 2031-a(2) provides that "no person shall do any electioneering within the polling place, or within one hundred feet therefrom . . . ." Though § 2031-a(1) requires the posting of notices, the prohibition in § 2031-a(2) is not conditioned on the posting of notices. *Compare* § 2031-a *with* N.Y. Education Law § 2609(4-a)(b) (McKinney 1981) ("*Where such markers are so placed* and the polls are open, no person shall do any electioneering within the polling place, or within one hundred feet therefrom . . . ." (emphasis added; emphasized language does not appear in § 2031-a(2))).

Further, even assuming that the plaintiff was ignorant of the law that forbade him to engage in electioneering activities within 100 feet of the school, and that his ignorance of the law gave him an excuse initially for electioneering activities within that range, he

plainly knew of the prohibition after a policeman was called and removed him from the 100-foot area.

Finally, even accepting the proposition that without physical signs demarking the area 100 feet from the High School this plaintiff did not know just how far away from the High School 100 feet extended, I cannot accept the proposition that he did not know that the High School steps were within 100 feet of the school.

As the majority concedes, "irrespective of where the 100 foot boundary was located, Appellee was well aware that he was inside it when he continued electioneering on the High School steps after speaking with the Superintendent and the police. *Ante* at 10. I do not agree with the majority that the failure of the school board to post markers showing the plaintiff where to stand in order to be "*just*" 100 feet away, *ante* at 11 (emphasis in original), gave him license to stand 0 feet away in the guise of lack of notice and to hold defendants liable for allegedly violating his right to campaign exactly 100 feet away.

APPENDIX B

Judgment of the U.S. District Court for the Southern District of New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRIAN CULLEN Plaintiff, — against — DR. HERBERT FLIEGNER, JOSEPH RIBANDO, ROBERT QUINN, KELD ALSTRUP, BERNARD MODDER, CONSTANCE JONES PHELPS, MICHAEL SANTOIANNI and THE TUXEDO UNION FREE SCHOOL DISTRICT, Defendants	CIVIL JUDGMENT

The issues in the above entitled action having been brought on for a consolidated hearing and non-jury trial on May 28, 1993, before the Honorable Charles L. Brieant, United States District Judge, and at the conclusion of said consolidated hearing and trial, the Court having made its findings of fact and conclusions of law in favor of the plaintiff and against the defendants, it is

ORDERED, ADJUDGED AND DECREED: That the plaintiff have judgment hereby (1) declaring that the New York State Education Law Section 3020-a proceeding, consisting of three charges preferred against the plaintiff on September 3, 1992, was commenced and prosecuted by the defendants in violation of the plaintiff's right to free speech as guaranteed by the First Amendment to the United States Constitution, (2) permanently enjoining the defendants from continuing with the prosecution of

said 3020-a proceeding, and (3) directing the defendants to pay the plaintiff's legal fees and disbursements in the amount of $19,082.65, together with taxable costs of this action.

Dated: White Plains, New York
June 21, 1993

APPROVED:
SO ORDERED:

/s/ Charles L. Brieant
U.S.D.J

/s/
Clerk

APPENDIX B (cont'd)

Findings of Fact and Conclusions of Law of the U.S. District Court for the Southern District of New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRIAN CULLEN,

Plaintiffs,

— against —

DR. HERBERT FLIEGNER, JOSEPH RIBANDO, ROBERT QUINN, KELD ALSTRUP, BERNARD MODDER, CONSTANCE JONES PHELPS, MICHAEL SANTOIANNO AND THE TUXEDO UNION FREE SCHOOL DISTRICT,

Defendants.

93 Civ. 2569

United States Courthouse
White Plains, New York

May 28, 1993

Before:

HON. CHARLES L. BRIEANT,
District Court Judge

GURDA, GURDA, SMITH & PAWLICZEK
Attorneys for Plaintiff
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Middletown, New York 10940
BY: ALEX SMITH, Esq., of Counsel
-and-
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PROCEEDINGS

THE CLERK: Cullen against Fliegner, et al.

THE COURT: Good afternoon. The Court appreciates the fact that you have undertaken to permit the Court to try this case on the stipulated statement of facts, which I presently have here before me. And I am now prepared to hear counsel, if there's anything other or further that any of you want to bring to the attention of the Court at this time.

MR. ISSEKS: Thank you. First, there are two additional facts which we would like to stipulate to that were inadvertently left out of the stipulation that was submitted to the Court. These facts could be added on to paragraphs 36 and 37 of the stipulation.

THE COURT: If you've agreed on it, please read it into the record.

MR. ISSEKS: Added on to paragraph 36 would be that there was no person designated by the defendants to monitor

electioneering outside the entrance of the high school to make sure that there was no electioneering in 100 feet of that entrance.

MR. RUSHFIELD: That's acceptable to the defendants, your Honor.

THE COURT: So stipulated.

MR. ISSEKS: The second is, in addition to paragraph 37, the second sentence should be amended to read the 1991-92 school year —

THE COURT: Where are you now, sir?

MR. ISSEKS: The second sentence of paragraph 37.

THE COURT: Yes.

MR. ISSEKS: The 1991-1992 school year during which the May 6, 1992 election occurred closed on June 26, 1992.

MR. RUSHFIELD: That is also acceptable to the defendant, your Honor.

THE COURT: All right, thank you.

MR. RUSHFIELD: Thank you, your Honor.

THE COURT: Now, as I gather, your client has no damages.

MR. ISSEKS: That's correct, your Honor.

* * *

THE COURT: This is a grudge fight that escalated beyond belief, it really has. I think the Court has to make its findings and conclusions in this matter, and the Court will now do so. And when I'm finished, if there's some additional finding or conclusions that you wish to have the Court make, I'll ask you one by one.

The Court finds every fact set forth in the stipulated statement of facts, and I don't feel any need to repeat them, although it's possible that in my oral analysis of this case I might do so.

The Court has indicated in informal discussions with counsel, and presently now confirms on the record, that I do not think it is probative of anything relevant to the decision in this case the fact that no charges were filed between the date of the school election on May 6, 1992 and June 26 when the open period during which charges can be filed against a teacher expired. The charges are not time-barred, as the Court understands it. And the fact that the charges were not filed until September is not a fact upon which this court relies or draws any inference adverse to the defendants. However, the Court does infer that it's clear from the record here and from responses and activities of the various participants that the defendants generally have had a past history of personal conflict with the plaintiff resulting in the making of charges and hearings and imposition of fines, and that the plaintiff, that the plaintiff shows that the plaintiff have a desire to do something about this particular defendant which rises to level of a animus and which must be considered in the analysis of what they did and why.

On April 20, 1993, this Court signed an order to show cause for a preliminary injunction enjoining the defendant, Tuxedo Union Free School District from continuing or pursuing their pending disciplinary proceeding against the petitioner Brian Cullen pursuant to New York State Education Law, section 3020-A, till a hearing and determination of the merits of this action could be held by the Court, the Court finding that it was apparent that the First Amendment rights of the plaintiff were subject to possible infringement here, and that even the hearing itself or the conduct of the hearing and the filing of the charges standing alone had a chilling effect on his First Amendment rights which was inappropriate under all the circumstances and that attempts to impose time and place restrictions on the exercise of his First Amendment rights was neither content neutral nor limited only to him.

The case involved section 2031-A of the election law, which provides similarly to laws regulating general elections and familiarity with that statute is assumed but essentially the statute imposes a duty on the inspectors of election to place conspicuously distance markers at a distance of 100 feet from the polling place,

and such distance markers shall indicate the prohibition contained herein and shall be placed some one half hour before the opening of the polls and shall remain till the polls are closed.

And the statute goes on to provide that no person shall do any electioneering within the polling place or 100 feet therefrom in any public street or within such distance in any place in a public manner.

And it goes on to provide about posters and the like and other provisions which are not directly relevant to this case, and the distance is 100 feet radial measured from the entrances, designated by the inspectors of election, to the building where the election is being held. And the Court assumes that the entire statute is a part of its findings and conclusions.

Plaintiff is a high school teacher in the Union Free School District in Tuxedo, and on September 3, 1992, the district filed disciplinary charges against the plaintiff which alleged that on May 6, 1992, he engaged in illegal electioneering in violation of section 2031-A of the Education Law and he distributed election materials within 100 feet of the entrance of the place of election. Hearings were started on this case and were ongoing at the time that this lawsuit was begun. And those hearings themselves had imposed a chilling effect on the First Amendment rights of the teacher plaintiff here and violated his First Amendment rights.

The pamphlet which he was distributing is in evidence, and it's been marked Exhibit C. The content of it is highly critical and really rather frivolous in a way, but it makes charges that the election is unjust and it denies democratic process because three of the five candidates are running for a single position and two of the candidates are unopposed. So it urges that they vote "no" for the unopposed, unjust candidates, which is a rather foolish thing to ask anyone to do because it's of no consequence.

On the other hand, this is clearly political expression which a person has a right to do and by becoming a teacher a citizen does not lose his First Amendment rights after hours. And on the hours of this election, at the time that these violations occurred, Mr. Cullen was not teaching, and he was off duty under his labo

contract as is stipulated in the facts herein and which the Court finds. It is absolutely clear and conceded that the Tuxedo school officials and the inspectors of election, whoever they were, were not in compliance with section 2031-A, since no distance markers had been used or posted, and the method of enforcing that law, if that's what they were trying to do here, was not the least restrictive means, because the Court finds that in the absence of a posted sign the statute cannot be enforced and the Court is convinced that no disciplinary charges would have been brought except for the content of the pamphlet, since it's clear without a posting there was no violation.

Therefore, the Court finds the disciplinary charges were brought in bad faith and maintained and continued in bad faith and constitute an ongoing violation of the plaintiff's First Amendment rights to be free in his speech and not to be harassed or prosecuted in any way for his expressions or based on the content of his expressions since he could not be found to have violated the law because there were no markers there.

The Court finds even if they tell him a hundred times over that he's within the prohibited distance they are disabled from enforcing the law unless the inspectors of election post notices or make a good-faith effort to post them. It may be in the hypothetical, the electioning people tore down the posters, that might be compliance to somebody who knew he was violating. In this case there was no such evidence.

The Court also perceives an unequal denial of equal protection of the laws because it's quite apparent in a contested election there may have been other people standing within the 100 feet distance and speaking with each other or greeting each other or making comments and these defendants made no effort whatever to police the area or send an agent out there to remain throughout the voting period or see whether other people were possibly electioneering. And the Court believes that this entire factual situation and the inferences which this Court has drawn from the stipulated facts require that a permanent injunction be issued granting the relief requested. It has been stipulated no monetary damages are sought.

The Court also finds as part of its analysis, and this fact, that the method of enforcement by ordering one person to remove himself from the prohibited area is not an adequate method of enforcement and it's not the least restrictive means of infringing on the vital fundamental right of free speech, and the proper and indeed the only way that this can be accomplished is to post the signs.

Apparently, everyone agrees that if this rather juvenile pamphlet had been handed out by this school teacher 101 feet from the door, they would have to lump it and like it, and there's nothing they can do the about it because he's off duty and he has the citizen right to claim the election is unjust and people should vote "no" for unopposed, unjust candidates for whatever good that would do.

There's no compelling state interest being served by what was done here and the *Burson* case is clearly distinguishable. It would be perfectly proper if they had posted the content neutral regulation as required by the statute and made it applicable to everybody and had someone there all day to enforce it as to everybody. That's a narrowly tailored governmental regulation of speech which is content neutral and is the least intrusive means. But this present means of enforcement was strictly *ad hominum* against this particular person. And while the Court could understand why the defendants might be a little bit angry with him over his conduct, they were absolutely unjustified in doing what they did.

The Court also notes that enforcement of crimes against the franchise are generally the obligation of the penal authorities who took no interest whatever in this matter. Although the police had been called to the area, no arrests were made by the police, and the District Attorney undertook no enforcement of any of the penal law provisions for crimes against the franchise and it's obvious he didn't because of the fact the 100-foot markers were not posted so there was no crime.

And, in a sense, the school district self-appointed itself to enforce whatever there is to be enforced knowing full well that they hadn't posted it. So, the means of enforcement, as I said earlier, employed in this case, cannot withstand strict scrutiny, because they're not narrowly tailored or content neutral and the statute has

provided as a condition preceded to liability that the posted signs have to be there.

In the *Burson* case the Supreme Court recognizes that public interests are served by a campaign-free zone. But the campaign-free zone is established by state law, and that means you have to mark it, and its purpose is to protect all the voters from confusion or undue influence and preserve the integrity the process.

As I noted earlier, he could have done what he did 101 feet away and there would have been no violation.

And the Court believes that it is improper and unconstitutional for this body to ignore the specific requirements of section 2031-A and then proceed to try to enforce the prohibition intended in that statute within their own unauthorized personal discretion by bringing a disciplinary proceeding based solely on oral information given to him that he was in an improper place. And in doing that, the school officials undermined the interests served by the objective use of markers which are narrowly tailored and less inclusive and content neutral.

And accordingly, the Court finds a violation of the First Amendment rights of the plaintiff which was a continuing one until the preliminary order to show cause was issued by this Court.

As I noted earlier, there are no damages. The plaintiff is entitled to a final judgment to be entered here which shall grant a permanent injunction against the defendants and each of them from pursuing in any way any disciplinary hearing whatsoever arising in any manner directly or indirectly out of the events of May 6 1992, and shall have his costs to be taxed and a reasonable attorney's fee.

And the Court will withhold the actual entry of the judgment until such time as the computation of the fee can be presented by affidavit and a reasonable opportunity to reply. You can agree on dates for that, if you will.

The Court places no emphasis on whether or not he knew what he was doing was illegal. Essentially, the Court believes it was not illegal unless they posted it.

Those are my findings and conclusions. Is there some other matter which the Court has failed to touch upon which either of you need to make a full record here?

Begin with you, Mr. Isseks.

MR. ISSEKS: No, there is not, your Honor.

THE COURT: All right.

MR. RUSHFIELD: No, your Honor.

* * *

THE COURT: And the Court continues the preliminary restraining order which was heretofore issued and served and which has been kept active until today by agreement of counsel is extended to and including such date as the Court signs the final judgment.

All right, thank you very much.

MR. RUSHFIELD: Thank you, your Honor.

MR. ISSEKS: Thank you.

(Whereupon, at 1:50 o'clock p.m., the proceedings were concluded.)

APPENDIX B (cont'd)

Stipulated Statement of Facts by Counsel and Order of the U.S. District Court for the Southern District of New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRIAN CULLEN,

Plaintiff,

— against —

DR. HERBERT FLIEGNER, JOSEPH RIBANDO, ROBERT QUINN, KELD ALSTRUP, BERNARD MODDER, CONSTANCE JONES PHELPS, MICHAEL SANTOIANNI and THE TUXEDO UNION FREE SCHOOL DISTRICT,

Defendants.

STIPULATED STATEMENT OF FACTS BY COUNSEL AND ORDER

93 Civ. 2569 (CLB)

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the plaintiff and the defendants that the following is deemed to set forth all the relevant facts for the Court's determination of plaintiff's action for an injunction under Rule 65, FRCP, on the consolidated hearing on the plaintiff's preliminary and permanent injunction application:

1. Plaintiff Brian Cullen is an individual residing in the Town of Tuxedo, County of Orange, State of New York, and is a tenured high school science teacher employed by the defendant Tuxedo Union Free School District.

2. Defendant Dr. Herbert Fliegner is, and at all times relevant was, the Superintendent of the Tuxedo Union Free School District, Tuxedo, New York.

3. Defendants Joseph Ribando, Robert Quinn, Keld Alstrup, Bernard Modder, Constance Jones Phelps, and Michael Santoianni are, and/or at all times relevant were, members of the Board of Education of the Tuxedo Union Free School District, Tuxedo, New York.

4. Defendant Tuxedo Union Free School District is, and at all times relevant was, a public school district located in the County of Orange, State of New York.

5. Plaintiff has been a full-time teacher in the Tuxedo Union Free School District for eighteen consecutive years.

6. On February 15, 1990, the Tuxedo Union Free School District filed charges against plaintiff pursuant to New York State Education Law § 3020-a alleging that (1) during a weekend, in violation of previous directives, plaintiff took a group of students on an unauthorized field trip in an aircraft to conduct a scientific experiment and (2) plaintiff encouraged students to expose themselves in one of his classes. These were the first § 3020-a disciplinary charges ever filed against plaintiff. Pursuant to § 3020-a 1., after a hearing before a three-member panel constituted pursuant to § 3020-a 3.c., plaintiff was found guilty of the first charge and was fined $1,250. The second charge was dismissed. Neither plaintiff nor the defendant School District filed any appeal of the panel's decision or penalty.

7. On February 13, 1992, the Tuxedo Union Free School District filed charges against plaintiff pursuant to New York State Education Law § 3020-a, alleging that (1) plaintiff ignited the aerosol spray of a Binaca Breath Spray in the presence of elementary grade school students of the High School in the school cafeteria during lunchtime when he was serving as a cafeteria lunch supervisor (2) that such conduct amounted to insubordination in that plaintiff had received a prior directive not to engage in such conduct. Pursuant to § 3020-a, a three-member panel constituted pursuant to § 3020-a 3.c. found plaintiff guilty of both charges. The

panel's decision as to guilt was announced on or about September 1, 1992. By written decision of the panel dated October 26, 1992, the panel decided that plaintiff was to receive a penalty of four months' suspension without pay. The defendant School District filed an appeal of the panel's penalty decision and such appeal is pending before the New York State Commissioner of Education.

8. The Tuxedo Union Free School District Teacher Handbook provides concerning "Public Conduct on School Property," in part, as follows:

> The Board of Education prohibits the following conduct or acts on school property by students, teachers, staff members, licensees, or invitees:
>
> (9) The violation of any federal or state statute, local ordinance, or board policy.
>
> (10) The refusal or failure of any person to comply with a lawful order or direction of an official of the school district in the performance of his duties.

9. On May 6, 1992, an election of candidates for the Board of Education of the Tuxedo Union Free School District and on the annual School District budget was held at the location of the George F. Baker High School. The elections were being conducted in the High School library which is in the basement of the High School.

10. The George F. Baker High School is on Tuxedo Union Free School District property. The front of the High School has a walkway, below which are steps leading to a concrete apron which itself leads to Tornado Drive. Across Tornado Drive is a High School parking lot which itself borders a lawn. The walkway, steps, concrete apron, parking lot and lawn are all School District property. Tornado Drive intersects with School House Road (to the left when facing out to Tornado Drive from the front entrance of the High School) and Hillside Avenue (to the right when facing out from Tornado Drive from the front entrance of the High School). Tornado Drive, School House Road and Hillside Avenue are all public roads and are not School District Property.

11. A drawing of the George F. Baker High School and the grounds surrounding it, including Tornado Drive, the parking lot across Tornado Drive and School House Road, which was annexed to the Complaint as Exhibit C is stipulated to by the parties as being an accurate representation of the High School and immediately surrounding area. The scale of the drawing is one inch equals forty feet.

12. At the time of the May 6, 1992 election, no distance markers were placed at a distance of 100 feet (or any other distance) from the High School. The School District was not in possession of such distance markers.

13. Prior to the May 6, 1992 election, the Tuxedo Union Free School District had approximately ten elections during the preceding nine years. The School District was neither in possession of nor placed distance markers during any of those elections.

14. During the morning of May 6, 1993, in response to an inquiry about the legality of electioneering and the distance from the polls if somebody wished to electioneer, Tuxedo Union Free School District Superintendent of School Herbert R. Fliegner looked up the issue in the 1990 Handbook, for New School Board Members, also known as the "Hagony [sic] handbook." The Handbook provides in this regard that electioneering is prohibited within "100 feet of the polling place in school district elections, including a prohibition against distribution or display of a candidate's election campaign materials." It is silent concerning the placement of distance markers.

15. Pursuant to the collective bargaining agreement concerning teachers, the teacher's work day ends at 2:56 p.m. At about 3:30 p.m. on May 6, 1992, plaintiff approached the High School, placed himself on the front steps of the High School approximately 41 feet from the entrance door to the High School and commenced handing out copies of a flier protesting the election. A copy of the flier is annexed to the Complaint as Exhibit B thereto and is stipulated to by the parties as being an accurate representation of the flier.

16. At about 3:30 p.m. on May 6, 1993, a member of the School District staff advised Superintendent Fliegner that plaintiff was distributing leaflets on the front steps of the High School. Superintendent Fliegner thereupon exited through the front door of the High School and approached the plaintiff who was distributing the leaflets at or about the bottom step of the High School steps.

17. At or about 3:35 p.m. on May 6, 1993, Superintendent Fliegner told the plaintiff that he was directing the plaintiff to move away from the steps of the High School; that the election law provides that you must be at least 100 feet away from the entrance of the High School if you want to be doing any electioneering. The plaintiff responded to Superintendent Fliegner that he would not remove himself from the location at the foot of the steps of the High School, that Superintendent Fliegner could not tell him to do anything as it was after school hours, that he had a right to be there, that he was not doing anything wrong and that he would not move unless instructed by the police to do so. Superintendent Fliegner reiterated his demand that the plaintiff remove himself from handing out the fliers at the foot of the steps and plaintiff again refused. Superintendent Fliegner thereupon went to his office and called Theodore d'Allesandro, Chief of the Town of Tuxedo Police Department, and requested him to send a police unit over to instruct the plaintiff to remove himself to an appropriate distance from the polling place. Chief d'Allesandro advised he would call back.

18. At about 3:40 p.m., while Superintendent Fliegner was in his office, plaintiff was observed handing out the fliers by Joseph Zanetti, the Business Administrator for the Tuxedo Union Free School District. Mr. Zanetti is one of the two central office administrators in the School District, supervises teachers and stands in for the Superintendent of the School District in running the School District in the Superintendent's absence.

19. Upon observing the plaintiff handing out the fliers, Mr. Zanetti went down the stairs and approached the plaintiff who was on the concrete apron at the bottom of the stairs. Mr. Zanetti advised the plaintiff that what he was doing was illegal, that plaintiff was not outside the required statute distance and that

plaintiff must cease and remove himself. Mr. Zanetti told the plaintiff he was directing him to do that. The plaintiff responded to Mr. Zanetti with words to the effect of "What law? What statute? You're making the rules up as you go along. I am not going unless the police remove me." Mr. Zanetti remained as the plaintiff continued to hand out the fliers.

20. After his conversation with Chief d'Allesandro, Superintendent Fliegner returned to the front of the High School at about 3:40 p.m., requested Mr. Zanetti to remain as his witness, and in Mr. Zanetti's presence directed plaintiff to remove himself to a hundred feet from the front door of the High School. Plaintiff again refused, repeated that Superintendent Fliegner could not tell him to do anything and further repeated that if the police told him to move, he would do so. Mr. Zanetti then asked the plaintiff if he understood what Superintendent Fliegner was directing the plaintiff to do and plaintiff responded, "Yes." Plaintiff remained at or about the foot of the steps of the High School.

21. Following his second conversation with plaintiff in which he directed him to remove his leafletting activity beyond 100 feet from the High School, Superintendent Fliegner returned to his office and received a phone call from Chief d'Allesandro. Chief d'Allesandro advised Superintendent Fliegner that he had double checked with the Commissioner of Elections, Shirley Jensen, in Goshen, New York and that he would be sending a unit over immediately to move the plaintiff away from the High School steps.

22. Also following Superintendent Fliegner's second directive to the plaintiff, Mr. Zanetti went back into the High School and telephoned the Orange County Commissioner of Elections, Shirley Jensen. Mr. Zanetti identified himself as the Business Administrator for the Tuxedo School District, advised her of a problem with a resident concerning the conduct of the school election and asked her to confirm the distance of permitted electioneering. Ms. Jensen told Mr. Zanetti that electioneering was prohibited within 100 feet of the front door of the polling place. Ms. Jensen also informed Mr. Zanetti of the provision of the Election Law providing for the placement of distance markers.

23. The Tuxedo Police Department dispatched Tuxedo Police Officer John J. Kelly to the High School where he was advised the plaintiff was passing out leaflets in front of the school. Officer Kelly first stopped at the station to check out the statute as to the distance that plaintiff was required to be away from the polling place and discovered it was 100 feet; he thereupon went to the High School.

24. Police Officer Kelly found the plaintiff on the paved portion of Tornado Drive immediately before the curb leading to the concrete apron in front of the stairs to the High School. The plaintiff was handing out the fliers and admitted this to Police Officer Kelly. Police Officer Kelly thereupon advised the plaintiff that under the election law, he could not pass out the fliers where he was and indicated to the plaintiff that he was not 100 feet from the polling place. The plaintiff indicated to Officer Kelly that he was not aware of the election law and that he would move over to the public road on School House Lane. Officer Kelly indicated to the plaintiff that if he went to the intersection of Tornado Drive and School House Lane, he would be well outside the 100 feet.

25. Officer Kelly walked with the plaintiff to the intersection of School House Lane and Tornado Drive and remained there as Officer Kelly left the scene.

26. While Officer Kelly was escorting the plaintiff to the intersection of School House Lane and Tornado Drive, Mr. Zanetti informed Superintendent Fliegner of his conversation with Commissioner of Elections Jensen. Superintendent Fliegner spoke to the High School custodians to discover whether there were any distance markers available and was told that there were none.

27. Superintendent Fliegner thereafter observed the plaintiff at the intersection of Tornado Drive and School House Lane for approximately 15 or 20 minutes until at least at or about 4:15 p.m., when Superintendent Fliegner departed the premises.

28. Prior to departing the premises, after the plaintiff had removed himself to Tornado Drive and School House Lane, Superintendent Fliegner spoke with the Tuxedo School District District Clerk, Nancy Bourke, at about 4:00 p.m.; at which time he

told Ms. Bourke that he was leaving and would return later in the evening; that there had been some trouble with the plaintiff with some electioneering and that if Ms. Bourke had any problems, she was to call the police to come.

29. At about 4:30 p.m., Ms. Bourke went to the main floor of the High School by the front entrance doors to inspect the area and witnessed the plaintiff standing in the middle of the parking lot in the front of the school with his fliers. Ms. Bourke then witnessed the plaintiff approach the automobile of a Ms. Donna Vaught as it proceeded to park in the area immediately to the right of the bottom of the steps on Tornado Drive in front of the school approximately 70 feet from the entrance to the High School and hand Ms. Vaught one of his fliers. Ms. Bourke thereupon called the dispatcher at the Tuxedo Police Department to report that the plaintiff was electioneering in front of the High School and was advised that a police officer would be sent over.

30. Prior to the arrival of the police officer, the plaintiff and Ms. Bourke engaged in a conversation in the High School hallway during which Ms. Bourke advised him that he could not hand out his fliers either there or on the front steps and that he had to be at least 100 feet away.

31. When Police Officer Gannon arrived, he spoke with the plaintiff in the High School and advised him that the doorways to the High School were the entrance to the polling place. Officer Gannon gave the plaintiff a copy of New York State Election Law § 8-104 which sets forth a prohibition of 100 feet radial measured from the entrances to a polling place for electioneering. The plaintiff agreed with Officer Gannon that the 100 foot prohibition extended from the High School entrances. Officer Gannon then escorted the plaintiff outside of the High School building to the intersection of Hillside Avenue and Tornado Drive. The plaintiff thereupon asked Officer Gannon if that location was acceptable. Both the plaintiff and Officer Gannon agreed that this location was at least 100 feet from the entrances to the High School and Officer Gannon said the location was fine.

32. Superintendent Fliegner returned to the High School at about 8:30 p.m. Shortly after 8:30 p.m., while Superintendent

Fliegner and others were congregating in the High School library waiting for the polls to close in the company of several members of the School Board and others, one or more voters walked into the library holding up copies of the plaintiff's flier and said that one of the teachers was outside handing out these fliers in front of the steps of the High School. Several Board members, *i.e.*, Board President Ribando, Board Vice President Quinn, Board member Houston, Mr. Zanetti, Ms. Bourke and Superintendent Fliegner thereupon went outside between 8:40 and 8:45 p.m. where the plaintiff was discovered out on the concrete apron in front of the front steps of the High School. Superintendent Fliegner and Board President Ribando advised the plaintiff that he was violating the election laws and asked him to move from the area. The plaintiff did not so move and Ms. Bourke returned to the High School building to again summon the police.

33. Around 8:50 p.m., Mr. Zanetti returned to the high School and observed the plaintiff between that time and 9:00 p.m. on the concrete apron at the foot of the front steps of the High School in possession of the fliers he had been handing out. Mr. Zanetti thereupon walked out to the plaintiff on the concrete apron at the foot of the steps and told him that what he was doing was illegal and directed him to leave. The plaintiff thereupon responded that he was beyond the hundred-foot radius. Mr. Zanetti thereupon responded to the plaintiff that he would "never learn."

34. Superintendent Fliegner and District Clerk Bourke each are responsible for the conduct of the election of May 6, 1992.

35. No written notice was posted during the May 6 election advising of the prohibition on election activity within 100 feet of the polling place.

36. No one physically measured the distance of 100 feet from the school entrance on or before May 6, 1992. No one pointed out to plaintiff on May 6, 1992 specifically where 100 feet from the school entrance was.

37. Section 3020-a 1. permits charges to be filed against a teacher only during the period between the actual opening and closing of the school year for which a teacher is normally required

to serve. The 1991-1992 school year during which the May 6, 1992 election occurred closed on June 26 1992. No charges against the plaintiff were filed before the end of the school year.

38. On September 1, 1992, at 1:40 p.m., Superintendent Fliegner telephoned the plaintiff and asked whether the plaintiff could meet with Superintendent Fliegner that day for a meeting the Superintendent had requested. The plaintiff was unable to attend such a meeting. During this telephone conversation, Superintendent Fliegner advised the plaintiff that he would be reviewing certain matters with the Board of Education, including the events of May 6, 1992.

39. On September 3, 1992, immediately following the actual opening of the 1992-1993 school year, Superintendent Fliegner preferred three formal charges against the plaintiff concerning the events of May 6, 1992. A copy of those charges and the finding of probable cause by the Board of Education are annexed to the Complaint herein as Exhibit A. At the time the charges were presented to the Board of Education, it was informed by its attorney that no distance markers had been placed at the High School on May 6, 1992. All three charges were unanimously held to be for probable cause by all six members of the Board of Education, including Board members Robert Quinn and Michael Santoianni who were running unopposed in the May 6, 1992 election and who were named in the plaintiff's flier handed out during that election.

40. During each incident forming the basis of the charges, the plaintiff was situated within 100 feet of the front doors of the High School.

41. Pursuant to Education Law § 3020-a, a hearing on the three charges was commenced before a three member panel constituted pursuant to § 3020-a 3.c. on February 26, 1993, at which time the District presented its case in full. A transcript of the hearing is annexed as Exhibit A to the Affidavit of David S. Shaw and the parties stipulate and agree that said transcript represents an accurate and complete portrayal of the testimony and statements made on the record at that hearing.

42. At the conclusion of the presentation of the School District's case, over the objection of counsel for the School District, the plaintiff's counsel stated that he had a right to seek a preliminary injunction staying the hearings on the basis that a constitutional First Amendment issue was involved, but would instead submit this constitutional claim to the Section 3020-a panel and have that panel decide it on a motion to dismiss the charges against the plaintiff. Thereupon, counsel for both parties stipulated on the record to the entire Section 3020-a panel hearing the plaintiff's motion to dismiss with the subject matter of that motion being limited to the "question of the denial of the constitutional rights by the complainant district with respect to the complaint, to the charges against him."

43. Both parties briefed the constitutional First Amendment issue to the Section 3020-a panel. Thereafter, on April 16, 1993, plaintiff's counsel was advised by telephone by the Chairman of the panel that the plaintiff's motion to dismiss was denied by a vote of 2 to 1.

44. By Order to Show Cause of this Court dated April 20, 1993, plaintiff commenced the instant action.

45. On April 22, 1993, the Section 3020-a panel rendered its decision, a copy of which is annexed to the Affidavit of David S. Shaw as Exhibit B. The panel specifically found that the placement of distance markers, as required by Education Law § 2031-a1. was not a condition precedent to application of the electioneering provision under § 2031-a2. and further found that "it is clear from the testimony of the hearing that when [the plaintiff] was directed to move and refused to do so, he was clearly within 100 feet of the polling place."

46. The panel further found that "the directives in this case to [the plaintiff] and the facts as evidenced at the hearing do not bring into question any violation of [the plaintiff's] constitutional rights." The panel thereupon denied the plaintiff's motion to dismiss the Section 3020-a, Education Law charges and determined that

there was no First Amendment barrier against proceeding to a determination on the merits.

GUAZZO, PERELSON,
RUSHFIELD & GUAZZO
Attorneys for Defendants
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By /s/
Mark S. Rushfield
(MCR 0231)

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By /s/
Robert N. Isseks
(RNI 0241)

The foregoing facts are found, modified by the oral stipulation of counsel this date and this Court's oral decision

SO ORDERED

May 28, 1993

/s/ Charles L. Brieant
USDJ

APPENDIX C

Memorandum and Order of the U.S. District Court for the Southern District of New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRIAN CULLEN,

Plaintiff,

— against —

DR. HERBERT FLIEGNER, JOSEPH RIBANDO, ROBERT QUINN, KELD ALSTRUP, BERNARD MODDER, CONSTANCE JONES PHELPS, MICHAEL SANTOIANNI and THE TUXEDO UNION FREE SCHOOL DISTRICT,

Defendants.

MEMORANDUM & ORDER

93 Civ. 2569 (CLB)

Brieant, J.

On May 28, 1993, after a trial on stipulated facts, this Court held that the defendants violated plaintiff Brian Cullen's right to free speech as guaranteed by the First Amendment when they commenced a disciplinary proceeding against Mr. Cullen pursuant to Section 3020-a of New York's Education Law proceeding. *See* May 28, 1993 Trial Transcript. Entry of a Final Judgment has been withheld pending this Court's determination on plaintiff's fee application.

Plaintiff now seeks a determination of the amount of attorneys fees and costs recoverable in this action. On June 11, 1993, counsel submitted an affidavit in support of the application requesting $18,900 in attorneys fees and $182.65 in disbursements for a total amount of $19,082.65.

Defendants concede that plaintiff is entitled to recover his attorneys fees under Section 1988, but oppose the application on the grounds that (1) the application does not contain detailed contemporaneous time records; (2) the application includes time charges for legal work done in preparing for the administrative hearing, as well as for counsel's attendance at the hearing; (3) the application includes excessive, duplicative and otherwise unnecessary hours; and (4) the hourly fees requested are excessive. *See* Court Doc. No. 15.

Plaintiff's fee application includes a request for 19 hours of legal services rendered by Robert N. Isseks, Esq. at an hourly rate of $200/hour and for 7 hours of legal services rendered by Alex Smith, Esq. at an hourly rate of $150 for investigating and preparing for the Section 3020-a panel hearings, attendance at the hearings and preparing the memorandum of law submitted to the Section 3020-a panel. Defendants contend that plaintiff should not be reimbursed for any work done in connection with the 3020-a administrative proceeding.

The Court disagrees. Most, if not all, of the work which was performed in connection with plaintiff's defense of the 3020-a proceeding would have been necessary to prove plaintiff's First Amendment claim in this Court. Indeed, the stipulated facts were gleaned from the testimony taken at the administrative hearing and the transcript of that proceeding was made part of this Court's trial record. The Court finds that plaintiff reduced the overall cost of litigating in this Court by relying upon the work performed in connection with the administrative proceeding and thereby, avoided the expense of discovery, depositions and trial time.

Moreover, the Court notes that counsel for plaintiff has not included in the fee application any time spent on "ministerial legal services that were specifically connected with the 3020-a proceeding and cannot be construed as preparation for this action, such as correspondence and communications with the State Education Department in selecting the hearing panel members, correspondence and communications with the panel chairman and the District's counsel in scheduling and rescheduling the hearing and preparation and serving of subpoenas on witnesses. . . ." Court Doc. No. 14,

Isseks Aff., ¶ 4. Therefore, the Court concludes that plaintiff's request for reimbursement for some of the work done in connection with the 3020-a administrative proceeding is appropriate in this case. *See North Carolina Department of Transportation v. Crest Street Community Council,* 479 U.S. 6. 15 (1986) (Discrete portion of the work product from the administrative proceeding that was useful and of a type necessary to advance the civil rights litigation, may be part of an award of attorney fees under Section 1988).

The fee application submitted by counsel for the plaintiff can only be characterized as reasonable. In making this determination, the Court finds that the contemporaneous time records submitted by counsel are sufficiently detailed to permit an award of attorney's fees in this case. *See Lewis v. Coughlin,* 698 F.2d 112, 128 (2d Cir. 1983); *New York Association for Retarded Children v. Carey,* 711 F.2d 1136, 1147, 1148 (2d Cir. 1983) (contemporaneous time records "should specify, for each attorney, the date, the hours expended, and the nature of the work done."). *See also* Isseks June 17, 1993 Aff., ¶¶ 2-4. The Court also notes that time spent preparing a fee application is compensable in this Circuit. *See Gagne v. Maher,* 594 F.2d 336, 343-45 (2d Cir. 1979), *aff'd on other grounds,* 448 U.S. 122 (1980); *New York Association for Retarded Children v. Carey,* 711 F.2d at 1148 (2d Cir. 1983).

The Court rejects defendants' suggestion that the fee should be reduced merely because the defendant is a school district, whose funds are public monies raised through local taxes. The School Board Members, who are the elected representatives of those same local taxpayers, vigorously opposed Mr. Cullen's claim despite its obvious merit and his modest settlement demand. Public policy compels this Court to award plaintiff's counsel such sum as will fairly and reasonably compensate counsel for the actual and necessary legal services rendered in vindicating Mr. Cullen's constitutional rights without regard to whether a defendant is a school district or not.

The Court finds that the hourly rates requested by plaintiff's counsel are fair and reasonable, as well as consistent with the prevailing rates in the legal community for similar work performed by attorneys of comparable experience and qualifications. *See*

Capwell v. Morales, 89 Civ. 6797 (CLB) (November 30, 1990 Memorandum & Order).

Finally, defendants argue that plaintiff is not entitled to recovery for the time expended by Mr. Smith appearing in Court since he "simply sat moot (sic)." *See* Court Doc. No. 15, Rushfield Aff., ¶ 11. The Court commends Mr. Smith for remaining mute, and knowing when to say nothing.

It is entirely reasonable for two attorneys to represent one plaintiff and the fact that attorney Smith said nothing on the record in Court does not mean that he did not otherwise provide valuable assistance to co-counsel in achieving an excellent result for their client. The law firm representing defendants also had two attorneys present in Court on May 14, 1993 and again on May 28, 1993. *DiFlippo v. Morizio,* 759 F.2d 231, 235 (2d Cir. 1985) ("[T]he reasonableness of the time expended must be judged by standards of the private bar."). Surely, the standard of reasonableness for plaintiff cannot be different than that for defendants.

While some of the "non-attorney tasks" performed by attorneys Isseks and Smith arguably could have been performed by someone other than the attorneys themselves, it is not unusual for attorneys in small offices to perform these tasks. In any event, the Court finds that a uniform rate of compensation is appropriate in this case. *Cf. Cohen v. West Haven Board of Police Commissioners,* 638 F.2d 496, 505 (2d Cir. 1980) ("a different rate of compensation may well be set for different types of litigation tasks.").

Based on the foregoing, plaintiff is awarded $18,900 in attorney fees and $182.65 in costs and disbursements, for a total award of $ 19,082.65.

The Court has signed a Final Judgement this date.

SO ORDERED.

Dated: White Plains, New York
June 21, 1993

/s/ Charles L. Brieant
Charles L. Brieant
USDJ

APPENDIX D

Finding in Education Proceeding #2598, Pursuant to New York Education Law § 3020-a, on Respondent's Motion to Dismiss

STATE OF NEW YORK
STATE EDUCATION DEPARTMENT
DIVISION OF EMPLOYER-EMPLOYEE RELATIONS

In the Matter of the

TUXEDO UNION FREE SCHOOL DISTRICT,

Complainant

vs.

BRIAN CULLEN,

Respondent-Tenured Teacher

Pursuant to Section 3020-a Education Law, Educational Proceeding (File #2598)

FINDING ON RESPONDENT'S MOTION TO DISMISS

Panel Members

James A. Cashen, Esq., Chairperson
Harvey Hillburgh, Board Panel Member
Robert Keenan, Employee Panel Member

APPEARANCES

District

Shaw & Silvera
by David Shaw, Esq. of Counsel and
Jay M. Siegel, Esq. of Counsel

Teacher

Robert N. Isseks, Esq. and
Alex Smith, Esq.

The hearing on this matter was held on February 26, 1993 commencing at 10:45 a.m. At the end of the hearing that day, attorneys for Respondent, Brian Cullen, moved to dismiss the charges on the ground that the proposed discipline of Respondent violated Respondent's rights under the First Amendment of the United State Constitution. The parties stipulated to authorize the Section 3020-a Education Law Panel to determine the motion to dismiss the case on the Constitutional grounds.

BACKGROUND

The Respondent contends that his First Amendment right of free speech was violated in the failure of the District to place distance markers, as required under Section 2031-a(1) of the State Education Law, indicating a 100 foot restricted zone from electioneering.

Testimony at the hearing was that, in fact, no distance markers were provided at the polling place on May 22, 1992, the day of the Board election and the Budget vote. Testimony also indicated that Respondent, Brian Cullen, handed out fliers to voters who came near to the polling place. The handing out of such fliers was contrary to an order of a police officer directing Mr. Cullen to move his electioneering beyond 100 feet from the polling place. The District Superintendent, the Business Manager and the Clerk of the Board of Education all directed Respondent to move his electioneering beyond the 100 foot boundary after the order of the police officer had been given. All three persons told Brian that the handouts were occurring within the 100 foot restricted zone provided for under Section 2031-a of the State Education Law.

The testimony of Patrolman John Kelly of the Village of Tuxedo Police Department was that he walked Respondent to a point clearly beyond 100 feet from the polling place and told Respondent to remain in that area in handing out the fliers. According to the record, Respondent agreed to do so.

FINDING

The Chairperson of the Panel and Mr. Hillburgh find that the action of the Tuxedo Union Free School District in charging Brian Cullen under Section 3020-a of the Education Law for

handing out fliers near the School District polling place, in defiance of directives to him from District and Board of Education representatives not to do so, did not restrict Mr. Cullen's right of free speech under the First Amendment.

In this connection, we cite the case of *Burson v. Freeman,* 504 U.S. ____, 112 S.C. 1846, 119 L.Ed 2nd 5. In this case, the United States Supreme Court in 1992 ruled that a provision in the Tennessee Election Code which prohibited electioneering within 100 feet from polling place entrances did not violate a citizen's First Amendment right of free speech.

While Respondent attempted to distinguish that case from the present one on several points, including especially the fact that in Section 2031-a(1) of the State Education Law, unlike the Tennessee Election Code, provided for the placement of distance markers at the 100 foot restricted zone boundary. We agree, however, with the District in its contention that the failure of the District to provide such markers did not create a situation which would bring into application the First Amendment. See *Bethel School District No. 403 v. Fraser,* 478 U.S. 675, 92 L.Ed.2d 549, (1986) and *Frasca v. Andrews,* 463 F. Supp. 1043 (EDNY 1979).

We also find that the placement of distance markers, as required by Section 2031-a(1) was not a condition precedent to application of the electioneering prohibition under Section 2031-a(2) of the Education Law as contended by the Respondent. In addition, it is clear from the testimony at the hearing that when the Respondent was directed to move and refused to do so he was clearly within 100 feet of the polling place.

Finally, we find the directives in this case to Respondent and the facts as evidenced at the hearing do not bring into question any violation of Respondent's constitutional rights. That is, the directives of the District and Board officials were not intended to, and did not in fact, prevent Respondent from expressing his opinion. See *Harris v. Mechanicville Central School District,* 45 N.Y. 2d 279 (1978).

CONCLUSION

We deny Respondent's motion to dismiss the Section 3020-a, Education Law charges and determine there is no First Amendment barrier against proceeding to a determination on the merits.

/s/
James A. Cashen, Esq.
Panel Chairperson

April 22, 1993

/s/
Harvey Hillburgh
Employer Panel Member

April 22, 1993

DISSENT

I dissent from the decision of Messrs. Cashen and Hillburgh. I would dismiss the charges against Respondent as the District failure to provide boundary markers as required by the Election Law resulted in the denial of Respondent's right of free speech in the least restrictive manner possible.

/s/
Robert Keenan
Employee Panel Member

April 22, 1993

APPENDIX E

Text of Statutes Involved

NEW YORK EDUCATION LAW

§ 3020-a. Hearing procedures and penalties

1. Filing of charges. All charges against a person enjoying the benefits of tenure as provided in subdivision three of section one thousand one hundred two, and sections two thousand five hundred nine, two thousand five hundred seventy-three, twenty-five hundred ninety-j, three thousand twelve, three thousand thirteen and three thousand fourteen of this law shall be in writing and filed with the clerk or secretary of the school district or employing board during the period between the actual opening and closing of the school year for which the employee is normally required to serve. Except as provided in subdivision eight of section two thousand five hundred seventy-three and subdivision seven of section twenty-five hundred ninety-j of this law, no charges under this section shall be brought more than three years after the occurrence of the alleged incompetency or misconduct, except when the charge is of misconduct constituting a crime when committed.

2. Disposition of charges. Upon receipt of the charges, the clerk or secretary of the school district or employing board shall immediately notify said board thereof. Within five days after receipt of charges, the employing board, in executive session, shall determine, by a vote of a majority of all the members of such board, whether probable cause exists. If such determination is affirmative, a written statement specifying the charges in detail, and outlining his rights under this section, shall be immediately forwarded to the accused employee by certified mail. The employee may be suspended pending a hearing on the charges and the final determination thereof. Within ten days of the receipt of the statement of charges, the employee shall notify the clerk or secretary of the employing board whether he desires a hearing on the charges. The inexcused failure of the employee to notify the clerk or secretary of his desire for a hearing within ten days of the receipt of charges shall be deemed a waiver of the right to a

hearing. Unless the employee has waived his right to a hearing within the allotted time, the clerk or secretary of the board shall, not later than the end of said ten-day period, notify the commissioner of education of the need for a hearing. If the employee waives his right to a hearing the employing board shall proceed, within fifteen days, by a vote of a majority of all the members of such board, to determine the case and fix the penalty or punishment, if any, to be imposed in accordance with subdivision four of this section.

3. Hearings.

a. Notice of hearing. Upon receipt of a request for a hearing in accordance with subdivision two of this section, the commissioner of education shall schedule a hearing, to be held in the local school district, or county seat, within twenty working days of his receipt of the request therefor, and immediately notify the employee and the employing board of the time and place thereof and the procedures to be followed in selecting a hearing panel.

b. Hearing panel members. For the purposes of this section the commissioner of education shall maintain a list of hearing panel members, composed of professional personnel without administrative or supervisory responsibility, professional personnel with administrative or supervisory responsibility, chief school administrators, members of employing boards and others, selected from lists of nominees submitted by statewide organizations representing teachers, school administrators and supervisors and the employing boards. Hearing panel members except the chairman of the panel shall be compensated at the rate of fifty dollars for each day of actual service plus necessary travel and subsistence expenses incurred in carrying out the duties of the panel member. The chairman of the panel shall be paid the normal and customary fee paid to him for services as an arbiter under the auspices of the American Arbitration Association.

c. Hearing procedures. The commissioner of education shall have the power to establish necessary rules and procedures for the conduct of hearings under this section. Such rules shall not require compliance with technical rules of evidence. All such hearings shall be held before a hearing panel composed of three

members not resident, nor employed, in the territory under the jurisdiction of the employing board, selected in the following manner from the list maintained by the commissioner of education for such purpose and from a list supplied by the American Arbitration Association: one member shall be selected by the employee, and one member shall be slected by the employing board from the list maintained by the commissioner, and the third member shall be chosen by mutual agreement of the first two, or, if they fail to agree, by the commissioner of education, from the list supplied by the American Arbitration Association. Such third member shall be chairman of the panel.

Each such hearing shall be conducted by the chairman of the panel and shall be public or private at the discretion of the employee. The employee shall have a reasonable opportunity to defend himself and an opportunity to testify in his own behalf. Each party shall have the right to be represented by counsel, to subpoena witnesses, and to cross-examine witnesses. All testimony taken shall be under oath which the chairman of the panel is hereby authorized to administer. A competent stenographer, designated by the commissioner of education, shall keep and transcribe a record of the proceedings at each such hearing. A copy of the transcript of the hearing shall, upon request, be furnished without charge to the employee and the board of education involved.

4. Post hearing procedures. Within five days of the conclusion of a hearing held under this section, the commissioner of education shall forward a report of the hearing, including the findings and recommendations of the hearing panel and their recommendations as to penalty or punishment if one is warranted, to the employee and to the clerk or secretary of the employing board. Within thirty days of receipt of such hearing report the employing board shall implement the recommendations thereof, which shall include the penalty or punishment, if any, of a reprimand, a fine, suspension for a fixed time without pay or dismissal. If the employee is acquitted he shall be restored to his position with full pay for any period of suspension and the charges expunged from his record.

5. Appeal. Either the employee or the employing board may review the findings of the hearing panel either by appeal to the commissioner of education as provided for by article seven of this chapter, or by a special proceeding under article seventy-eight of the civil practice law and rules. The hearing panel's determination shall be deemed to be final for the purpose of such proceeding.

6. Notwithstanding any other provision of law to the contrary, a hearing panel member who is employed by a public school district or board of cooperative educational services shall be released from duty by such district or board for such period necessary to carry out the responsibilities of such panel member. Nothing contained in this subdivision shall be construed to diminish or impair any benefits to which such hearing panel member or his legal representative or beneficiaries would be otherwise entitled had such panel member not been released from duty in accordance with the provisions of this subdivision, provided, however, that such district or board may require such panel member to reimburse such district or board an amount equal to the daily compensation otherwise payable pursuant to this section.

NEW YORK EDUCATION LAW

§ 2031-a. Electioneering within one hundred feet of polling place prohibited; distance markers.

1. At every election held for the office of trustee or member of a board of education and at every vote upon any proposition or issue in a school district where the election or vote is held at a different time from, and not during, the annual meeting of the district, there shall be conspicuously placed, by the inspectors of election, distance markers at a distance of one hundred feet from the polling place. Such distance markers shall indicate the prohibition contained herein and shall be so placed at least one-half hour before the opening of the polls and shall remain until the polls are closed.

2. At such elections or voting held at a different time from, and not during, the annual meeting of the district, while the polls are open no person shall do any electioneering within the

polling place, or within one hundred feet therefrom in any public street, or within such distance in any place in a public manner and no banner, poster or placard on behalf of or in opposition to any candidate or issue to be voted upon shall be allowed in or upon the polling place or within one hundred feet therefrom during the election. For the purposes of this section, the one hundred foot distance shall be deemed to include a one hundred foot radial measured from the entrances, designated by the inspectors of the election, to a building where such election is being held. This section shall not be deemed to prohibit the board of trustees or board of education from displaying within any polling place a copy or copies of any budget or proposition to be voted upon.

NEW YORK EDUCATION LAW

§ 2609. Conduct of election; challenges

4-a. (a) At each such election there shall be conspicuously placed, by the inspectors of election, distance markers at a distance of one hundred feet from the polling place. Such distance markers shall indicate the prohibition contained in paragraph (b) of this subdivision and shall be so placed at least one-half hour before the opening of the polls and shall remain until the polls are closed.

(b) Where such markers are so placed and the polls are open, no person shall do any electioneering within the polling place, or within one hundred feet therefrom in any public street, or within such distance in any place in a public manner and no banner, poster or placard on behalf of or in opposition to any candidate or issue to be voted upon shall be allowed in or upon the polling place or within one hundred feet therefrom during the election. For the purposes of this subdivision, the one hundred foot distance shall be deemed to include a one hundred foot radial measured from the entrances, designated by the inspectors of election, to a building where such election is being held. This section shall not be deemed to prohibit the board of trustees or board of education from displaying within any polling place a copy or copies of any proposition to be voted upon.

NEW YORK ELECTION LAW

§ 8—104. Polls

1. The American flag shall be kept displayed at each polling place throughout the election. Facsimile ballots and distance markers shall not be taken down, torn or defaced during the election. While the polls are open no person shall do any electioneering within the polling place, or in any public street, within a one hundred foot radial measured from the entrances designated by the inspectors of election, to such polling place or within such distance in any place in a public manner; and no political banner, button, poster or placard shall be allowed in or upon the polling place or within such one hundred foot radial. While the polls are open no person shall consume any alcoholic beverages within the polling place.

2. The boxes and all official ballots shall be kept within the guard-rail, and at least six feet therefrom, from the opening of the polls until the announcement of the result of the canvass and the signing of the inspectors' returns thereof. No person shall be admitted within the guard-rail during such period except the election officers, authorized watchers, persons admitted by the inspectors to preserve order or enforce the law, and voters duly admitted for the purpose of voting; provided, however, that candidates voted for at the polling place may be within the guard-rail during the canvass.

3. The provisions of this chapter concerning the preservation of order and apprehension for crime on a day of registration, shall apply to a day of election, but a person taken into custody shall not be prohibited thereby from voting.

4. After a ballot box shall have been locked for the purposes of election, it shall not be opened until it is opened at the close of the polls for purposes of canvass. Each inspector shall be responsible personally for the custody of each ballot box and its contents from the time the election begins until the box is delivered, according to law, to the person entitled to receive it.

5. Voters entitled to vote who are on line or in the polling place at the time fixed by law for the closing of the polls shall be allowed to vote.

6. In the city of New York, during days of primary, general, special and community school board elections, at each premises wherein a polling place or places are located, at least one police officer or peace officer designated by the police commissioner of such city pursuant to the provisions of article two of the criminal procedure law shall be assigned for duty from the opening until the closing of the polls. Additional police officers or peace officers may be assigned as is deemed appropriate by the police commissioner of such city.

APPENDIX F

Complaint, filed April 20, 1993, with Exhibits A, B and C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRIAN CULLEN, Plaintiff, — against — DR. HERBERT FLIEGNER, JOSEPH RIBANDO, ROBERT QUINN, KELD ALSTRUP, BERNARD MODDER, CONSTANCE JONES PHELPS, MICHAEL SANTOIANNI and THE TUXEDO UNION FREE SCHOOL DISTRICT, Defendants.	COMPLAINT

I. PARTIES

1. Plaintiff, BRIAN CULLEN is an individual residing in the Town of Tuxedo, County of Orange, State of New York.

2. Defendant DR. HERBERT FLIEGNER is, and at all times relevant was, the Superintendent of the Tuxedo Union Free School District, Goshen, New York.

3. Defendants JOSEPH RIBANDO, ROBERT QUINN, KELD ALSTRUP, BERNARD MODDER, CONSTANCE JONES PHELPS, and MICHAEL SANTOIANNI are, and/or at all times relevant were, members of the Board of Education of the Tuxedo Union Free School District, Tuxedo, New York (hereinafter referred to as the "Board member defendants").

4. Defendant TUXEDO UNION FREE SCHOOL DISTRICT is, and at all times relevant was, a public school district located in the County of Orange, State of New York.

II. JURISDICTION AND VENUE

5. This is a civil action authorized by 42 U.S.C. Sections 1983 and 1985 for compensatory and punitive damages and for injunctive and declaratory relief to redress the deprivation, under color of state law, of rights, privileges and immunities secured to plaintiff by the First and Fourteenth Amendments to the United States Constitution. Jurisdiction is conferred by 28 U.S.C. Sections 1331, 1343 and 2201.

6. This action is properly filed in the United States District Court for the Southern District of New York, as authorized by 28 U.S.C. Section 1391, inasmuch as jurisdiction of this action is not founded on diversity of citizenship, each claim arose within the Southern District of New York, and plaintiff resides within the Southern District of New York.

III. STATEMENT OF FACTS

7. Plaintiff is a tenured high school science teacher, employed by the defendant Tuxedo Union Free School District (hereinafter referred to as "District").

8. Plaintiff has been a full-time teacher for the District for 18 consecutive years.

9. Throughout plaintiff's employment with the District plaintiff has competently performed his duties and has fulfilled his responsibilities as a secondary teacher, receiving only excellent observations of his teaching.

10. From the time plaintiff commenced his employment with the District he received no complaints regarding his fitness to teach and was never the subject of any disciplinary proceeding, until February 15, 1990, when the District filed charges against plaintiff pursuant to New York State Education Law Section 3020-a alleging that (1) during a weekend, plaintiff took a group of students on an unauthorized field trip in an aircraft to conduct a scientific experiment and (2) plaintiff encouraged students to expose

themselves in one of his classes. After a hearing before a three-member panel, plaintiff was found guilty of the first charge and a fine was imposed. The fine was imposed after the hearing panel noted that plaintiff was "a dedicated, competent and enthusiastic teacher . . . clearly a very fine teacher." The second charge was dismissed by the hearing panel as "trivial, inconsequential, of no significance."

11. On February 13, 1992, the District again filed Education Law 3020-a charges against plaintiff, this time alleging that (1) he conducted a dangerous scientific experiment in the school cafeteria during lunchtime and (2) that such conduct amounted to insubordination in that plaintiff had received a prior directive not to conduct such experiment. On or about September 1, 1992, at a hearing session scheduled for the sole purpose of the panel announcing its decision, the panel announced that it had found plaintiff guilty of both charges. (By written decision of the panel dated October 26, 1992, plaintiff received a penalty of 4 months suspension without pay.)

12. On September 3, 1992, three new Education Law 3020-a charges against plaintiff were preferred by defendant Fliegner and found, by vote of the Board member defendants in executive session to be supported by probable cause. These three charges read as follows:

> CHARGE I—MISCONDUCT AND/OR CONDUCT UNBECOMING A TEACHER AND/OR INSUBORDINATION
>
> In that on or about May 6, 1992, at approximately 4:30 p.m., Mr. Brian Cullen, a tenured teacher, engaged in illegal electioneering in violation of Section 2031-a of the Education Law. Mr. Cullen engaged in such conduct after he knew he could not engage in electioneering within 100 feet of the entrance door to the place of the election (Tuxedo High School). This conduct was undertaken after receiving a directive from Superintendent of Schools, Dr. Herbert Fliegner, at approximately 3:30 p.m. on May 6, 1992, not to engage in illegal electioneering . . .

CHARGE II—MISCONDUCT AND/OR CONDUCT UNBECOMING A TEACHER AND/OR INSUBORDINATION

In that on or about May 6, 1992, at approximately 8:30 p.m., Mr. Brian Cullen, a tenured teacher, engaged in illegal electioneering in violation of Section 2031-a of the Education Law. Mr. Cullen engaged in such conduct after he knew he could not engage in electioneering within 100 feet of the entrance door to the place of the election (Tuxedo High School). This conduct was undertaken after receiving a directive from Superintendent of Schools, Dr. Herbert Fliegner, at approximately 3:30 p.m. on May 6, 1992, and Board of Education Clerk, Nancy Bourke, at 4:30 p.m., who was responsible for conducting the election, not to engage in illegal electioneering . . .

CHARGE III—MISCONDUCT AND/OR CONDUCT UNBECOMING A TEACHER AND/OR INSUBORDINATION

In that on or about May 6, 1992, at approximately 8:50 p.m., Mr. Brian Cullen, a tenured teacher, engaged in illegal electioneering in violation of Section 2031-a of the Education Law. Mr. Cullen engaged in such conduct after he knew he could not engage in electioneering within 100 feet of the entrance door to the place of the election (Tuxedo High School). This conduct was undertaken after receiving a directive from Business Administrator, Joseph Zanetti, not to engage in illegal electioneering . . .

13. New York State Education Law Section 2031-a is entitled "Electioneering within one hundred feet of polling place prohibited; distance markers," and provides, *en toto*:

1. At every election held for the office of trustee or member of a board of education and at every vote upon any proposition or issue in a school district where the election or vote is held at a different time from, and not during, the annual meeting of the district, there shall be conspicuously placed, by the inspectors of election, distance markers at a

distance of one hundred feet from the polling place. Such distance markers shall indicate the prohibition contained herein and shall be so placed at least one-half hour before the opening of the polls and shall remain until the polls are closed.

2. At such elections or voting held at a different time from, and not during, the annual meeting of the district, while the polls are open no person shall do any electioneering within the polling place, or within one hundred feet therefrom in any public street, or within such distance in any place in a public manner and no banner, poster or placard on behalf of or in opposition to any candidate or issue to be voted upon shall be allowed in or upon the polling place or within one hundred feet therefrom during the election. For the purposes of this section, the one hundred foot distance shall be deemed to include a one hundred foot radial measured from the entrances, designated by the inspectors of election, to a building where such election is being held. This section shall not be deemed to prohibit the board of trustees or board of education from displaying within any polling place a copy or copies of any budget or proposition to be voted upon.

14. A hearing on the above charges was commenced before a three-member panel on February 26, 1993, at which time the District presented its case in full. The District's proof included the following.

15. Fliegner testified that he actually read Education Law 2031-a on the morning of May 6, 1992. Nevertheless, Fliegner admitted that he did nothing to insure the emplacement of the statutorily mandated markers at any of the entrances to the Tuxedo High School, the District's polling place. Despite Fliegner's concession that it was his responsibility and duty on May 6, 1992, to enforce the provisions of Education Law 2031-a, there is no dispute that no markers were ever placed at the entrance to the High School on that day. There is no dispute that no written notice was ever posted anywhere containing the prohibition set forth in Education Law 3021-a. There is also no dispute that no one on

behalf of the District ever measured the distance of 100 feet from the school entrance on or before May 6, 1992.

16. Fliegner testified that at about 3:30 on May 6, 1992, he was advised that plaintiff was distributing leaflets on the front steps of the High School. Fliegner went outside the school and confronted plaintiff near the bottom of the steps by telling plaintiff to remove himself from the steps to somewhere outside a 100-foot radius of the entrance of the high school.

17. Plaintiff was distributing his flier as a citizen of the Tuxedo Union Free School District Tuxedo Union Free School District, not as a teacher. Fliegner admitted during his testimony that when he saw plaintiff at 3:30, it was after school hours in that the teachers' contract provided that their work day ended before that time.

18. Fliegner testified that when he told plaintiff to remove himself, plaintiff refused to do so, saying words to the effect, "Where is the police? If the police tell me to move, I will. You can't tell me to do anything. This is after school hours. I have a right to be here and I'm not doing anything wrong." Fliegner reiterated his directive to plaintiff to remove himself and plaintiff continued to refuse.

19. Fliegner testified that he then called the police to instruct plaintiff to remove himself to the appropriate distance.

20. Fliegner testified that he then went out again and once more directed plaintiff to remove himself "to within a 100 feet radial distance from the high school front door". Again plaintiff refused and repeated in essence the same thing he had said before: "Where are the police? If the police tell me to go, I'll leave. You can't tell me to do anything."

21. Fliegner testified that plaintiff then said to him "You make up the rules as you go along. You use your position, your authority to get your way."

22. Fliegner testified that he went back into the school and shortly thereafter observed a police officer, Sgt. John Kelly, speak

to plaintiff and walk plaintiff to a different location near the corner of Tornado Drive and Schoolhouse Road.

23. Fliegner testified that he went home at 4:15 that afternoon and did not return until 8:30.

24. Fliegner testified that shortly after his return to the High School he again confronted plaintiff and told him to leave and plaintiff again refused.

25. Fliegner admitted that although inspectors of election were present at the polling place on May 6, 1992, he took no action to have them comply with Education Law Section 2031-a and instead simply advised them that plaintiff, in his opinion, was violating the law.

26. Fliegner admitted that his concern was not with the District's failure to place markers, as mandated by the statute he read that very morning, but only with plaintiff.

27. The flier that plaintiff was handing out on May 6, 1992, a copy of which is annexed hereto and made a part of this complaint, urged the electorate not to vote for defendants Quinn and Santoianni, two of Board member defendants who voted to bring the subject Education Law Section 3020-a charges against plaintiff.

28. The District's next witness at the hearing, the District Clerk, Nancy Bourke, testified that at about 4:30, she saw plaintiff standing by himself in the middle of the parking lot with the fliers in his hand and then handed a flier to a voter as that voter parked her car in the roadway in front of the school at the bottom of the steps.

29. Bourke testified that she called the police and reported that plaintiff was electioneering in front of the school.

30. Bourke testified that thereafter, in the school hallway, she said to plaintiff, "Brian, you can't hand out those papers here or on the front steps. You have to be at least a hundred feet away."

31. Bourke testified that at about 8:30, some more people walked into the library carrying plaintiff's fliers and Bourke went

outside with defendants Fliegner and Ribando and saw plaintiff and others standing on the curb area at the bottom of the steps.

32. The District's third witness, District Business Administrator, Joseph Zanetti, testified that he first observed plaintiff between 3:30 and 4:00 at the bottom of the front steps handing out the fliers, at which time Zanetti told plaintiff, "Brian, what you're doing is illegal. You are not outside the required statute distance . . . " without specifying what that distance was, and that he must cease and remove himself.

33. Zanetti testified that at that point plaintiff said, in effect, "Well, what law? What statute? You're making the rules up as you go along. I am not going unless the police remove me," or words to that effect.

34. Zanetti testified that plaintiff continued to hand out the flier on the concrete apron below the bottom step, and that he, Zanetti, told each voter who received a flier that what plaintiff was doing was in violation of the election laws and that he had been told to remove himself and didn't.

35. Zanetti testified that at approximately 4:00 he went home and did not return to the school until about 8:50, at which time he observed plaintiff again with his fliers on the concrete apron and he said to plaintiff, "Brian, what you are doing is illegal. I am directing you to leave." Zanetti testified that plaintiff responded, "I am beyond a hundred foot radius." Zanetti testified that he then said, "Brian, you'll never learn."

36. Zanetti testified that he never pointed out to plaintiff the area where he, Zanetti, thought 100 feet was. Zanetti testified that he "did not point to any place and say it was okay to electioneer."

37. The District's last witness, Police Officer Kelly, testified that around 3:30 he observed plaintiff passing out the fliers on the paved portion of Tornado Drive right in front of the steps, at which time he asked plaintiff, "Brian, what are you doing?" and plaintiff told Kelly he was handing out pamphlets. Kelly testified that he then advised plaintiff about the election law and the distance he should be away from the "polling grounds" and told plaintiff that he, Kelly, thought plaintiff would be well within the distance if he

either proceeded to the right, to Schoolhouse Road, or to the left, to Hillside Avenue.

38. Kelly testified that he believes he told plaintiff that he, plaintiff, had to be 100 feet from the polling place, not from the doors.

39. Kelly testified that he never told plaintiff where he thought a hundred feet from the entrance to the polling place was.

40. Kelly testified that plaintiff said he was not aware of the election law or that what he was doing was wrong and walked to the intersection of Schoolhouse Road and Tornado Drive, a location which, according to Kelly, exceeded a distance of 100 feet from the entrance to the school.

41. On September 1, 1992, just three hours after the previous three-member panel announced its decision on the aforementioned second set of 3020-a charges against plaintiff, Fliegner telephoned plaintiff and advised him that new 3020-a charges were going to be brought arising out of plaintiff's electioneering on May 6, 1992. Two days later, Fliegner preferred the instant 3020-a charges to the Board member defendants, four months from the date of the District's elections.

42. Fliegner testified at the hearing that before the Board member defendants voted to discipline plaintiff for purportedly violating Education Law Section 3021-a, they were advised by the attorney for the District that the District itself failed to emplace the mandated markers and notice.

IV. IRREPARABLE INJURY

43. By virtue of the foregoing, plaintiff has been and continues to be irreparably injured in that the defendants' conduct is interfering with plaintiff's participating in his chosen profession and is having a chilling affect upon his right to freedom of speech as guaranteed by the First Amendment to the United States Constitution.

44. Plaintiff will suffer further irreparable injury if defendants are permitted to continue their disciplinary proceeding against him, for such proceeding constitutes an ongoing

infringement upon plaintiff's right to freedom of speech in violation of the guarantees provided by the First Amendment to the United State Constitution.

45. At the conclusion of the District's presentation of its case at the hearing, plaintiff moved to dismiss the charges on the constitutional ground set forth in this complaint. The hearing was adjourned to April 22, 1993, for the receipt of memoranda from counsel and a decision on the motion by the panel. (The accompanying memorandum is essentially the same as the one submitted to the panel with some editorial revisions.)

46. On April 16, 1993, plaintiff's counsel was advised by telephone by the chairman of the panel that the motion was denied by a vote of 2 to 1. No written decision has been received to date.

V. CAUSE OF ACTION

47. The acts, conduct and behavior of the defendants, and each of them, acting individually and in concert with one another, were performed knowingly, maliciously, and in retaliation against plaintiff for his voicing his criticism of the May, 1992, District School Board candidates and of the way the District was conducting its election.

48. The subject Education Law Section 3020-a charges are pretextual and were brought in bad faith in that the District and the individual defendants have demonstrated their complete lack of concern for the fact that the District, through Fliegner, totally ignored the mandates of Education Law 3021-a as it applied to the District, and have chosen to enforce such mandates only to punish plaintiff.

49. The defendants are opportunistically using the District's own violation of Education Law Section 3021-a—its failure to measure and demarcate the 100 foot radius and to post proper notice on the markers of the prohibition contained in the statute—to punish plaintiff, a tenured teacher.

50. By virtue of the conduct herein alleged, defendants, acting individually and in concert, under color of state law, deprived, and are continuing to deprive, plaintiff of the rights,

privileges and immunities secured by the Constitution of the United States, specifically:

(a) The right of plaintiff to freedom of speech under the First Amendment;

(b) The right of plaintiff not to be deprived of liberty or property without procedural due process of law secured by the Fourteenth Amendment;

(c) The right of plaintiff to substantive due process of law secured by the Fourteenth Amendment;

(d) The right of plaintiff to the equal protection of the laws secured by the Fourteenth Amendment.

51. Plaintiff has been damaged as a result of the conduct complained of herein.

52. The acts, conduct and behavior of defendants in concert and individually were performed knowingly, intentionally, maliciously and in willful violation of the United States Constitution and Laws, entitling plaintiff to punitive damages.

WHEREFORE, Plaintiff asks this Court to:

A. Issue an order adjudging and declaring that the pending disciplinary proceedings commenced by the defendants against plaintiff are not authorized by statute, regulation or contract and violate plaintiff's rights under the First and Fourteenth Amendments to the United States Constitution;

B. Issue a preliminary injunction ordering the defendants to refrain immediately and pending the final hearing and determination of this action from continuing with the pending disciplinary proceedings commenced against plaintiff;

C. Issue a permanent injunction perpetually enjoining and restraining defendants and all those in active concert or participation with them in the conduct complained of herein;

D. Award plaintiff compensatory damages in an amount to be determined by the Court;

D. Award plaintiff punitive damages in an amount to be determined by the Court;

E. Award plaintiff the costs and disbursements of this action;

F. Award plaintiff reasonable attorney fees; and

G. Grant plaintiff such further and other relief as to this Court may seem just and proper.

Dated: April 20, 1993

Respectfully submitted,

ROBERT N. ISSEKS, ESQ.
40 Park Place
P.O. Box 247
Goshen, New York 10924
(914) 294-9255/7292

/s/
ROBERT N. ISSEKS (RI 0241)

ALEX SMITH, ESQ.
41 Dolson Avenue
Middletown, New York 10940
(914) 343-2101

Form 3020-a-1

The University of the State of New York
The State Education Department
School District Employer-Employee Relations Unit
Education Building, Room 510, West Hall
Albany, New York 12234

Notice of Determination of Probable Cause on
Charges Brought Against Tenured School District Employee
Section 3020-a, Education Law

To: Mr. Brian Cullen
(name of tenured school district employee)

Address: Eagle Valley Road, Sloatsburg, New York 10974
(name and address of the tenured school district employee)

Please be advised that (board of education,
Tuxedo Union Free School District , Tuxedo Park, New York 10987
(legal title of district) *(address)*

meeting in executive session 9/3/92, has found that there is probably cause
(date)

for the following charge preferred against you by Dr. Herbert Fliegner:
(name of complainant)

(Please describe charge in detail)

CHARGE I — MISCONDUCT AND/OR CONDUCT UNBECOMING A TEACHER AND/OR INSUBORDINATION

In that on or about May 6, 1992, at approximately 4:30 P.M., Mr. Brian Cullen, a tenured teacher, engaged in illegal electioneering in violation of § 2031-a of the Education Law. Mr. Cullen engaged in such conduct after he knew he could not engage in electioneering within 100 feet of the entrance door to the place of the election (Tuxedo High School). This conduct was undertaken after receiving a directive from Superintendent of

Schools, Dr. Herbert Fliegner, at approximately 3:30 P.M. on May 6, 1992, not to engage in illegal electioneering.

In the event of a finding of guilt on the above-stated charge, the teacher's prior disciplinary record, if any, shall be introduced for the Section 3020-a Panel's consideration in determining the appropriate discipline.

CHARGE II — MISCONDUCT AND/OR CONDUCT UNBECOMING A TEACHER AND/OR INSUBORDINATION

In that on or about May 6, 1992, at approximately 8:30 P.M., Mr. Brian Cullen, a tenured teacher, engaged in illegal electioneering in violation of § 2031-a of the Education Law. Mr. Cullen engaged in such conduct after he knew he could not engage in electioneering within 100 feet of the entrance door to the place of the election (Tuxedo High School). This conduct was undertaken after receiving a directive from Superintendent of Schools, Dr. Herbert Fliegner, at approximately 3:30 P.M. on May 6, 1992, and Board of Education Clerk, Nancy Bourke, at 4:30 P.M., who was responsible for conducting the election, not to engage in illegal electioneering.

Addendum to 1st page of Form 3020-a-1

CHARGE II — MISCONDUCT AND/OR CONDUCT UNBECOMING A TEACHER And/OR INSUBORDINATION (continued)

In the event of a finding of guilt on the above-stated charge, the teacher's prior disciplinary record, if any, shall be introduced for the Section 3020-a Panel's consideration in determining the appropriate discipline.

CHARGE III — MISCONDUCT AND/OR CONDUCT UNBECOMING A TEACHER AND/OR INSUBORDINATION

In that on or about May 6, 1992, at approximately 8:50 P.M., Mr. Brian Cullen, a tenured teacher, engaged in illegal electioneering within 100 feet of the entrance door to the place of the election (Tuxedo High School). This conduct was undertaken after receiving a directive from Business Administrator, Joseph Zanetti, not to engage in illegal electioneering.

In the event of a finding of guilt on the above-stated charge, the teacher's prior disciplinary record, if any, shall be introduced for the Section 3020-a Panel's consideration in determining the appropriate discipline.

Within ten days of receipt of these charges, you must elect to request a hearing before a three member panel, or waive your rights to such a hearing. Should you fail to so request or to waive within the specified ten days, the district clerk or the secretary of the board of education will notify both you and the Commission of Education that a waiver has been deemed to have occurred and that the board of education will meet to determine the case and fix the penalty or punishment, if one is to be imposed.

9/8/92
(Date of Notice)

/s/
(Signature of District Clerk or Secretary of the Board of Education)

Nancy Bourke
(Please Type or Print Name)

Copy *must* be sent to:

Commissioner of Education
State Education Department
School District Employer-Employee Relations Unit
Education Building, Room 510, West Hall
Albany, New York 12234

Attached is a copy of the Rights of Tenured Employees under Section 3020-a of the Education Law. A copy of this charge is being forwarded to the New York State Commissioner of Education, as required by law.

Form 3020-a-1-B

(Attach to From 3020 a-1 for each charge)

The University of the State of New York
The State Education Department
School District Employer-Employee Relations Unit
Education Building, Room 510, West Hall
Albany, New York 12234

Supplemental Notification of Board Vote
Determination of Probable Cause
Section 3020-a, Education Law

To: the Commissioner of Education:

This finding of probable cause as to the charge numbered I was affirmed by the following board members, constituting a majority:

1. Joseph Ribando	4. Bernard Modder	7. _____
2. Robert Quinn	5. Constance Jones Phelps	8. _____
3. Keld Alstrup	6. Michael Santoianni	9. _____
(names)	*(names)*	*(names)*

The following board members, constituting a minority, voted against a finding of probable cause:

1. _____	3. _____
2. _____	4. _____
(names)	*(names)*

The following board members were absent:

1. _____ 3. _____

2. _____ 4. _____
(names) *(names)*

There is one vacancy on the Board

9/8/92
(Date)

/s/
(Signature of District Clerk or Secretary of the Board of Education)

NOTE: There should be a separate vote as to each charge.

Form 3020-a-1-B

(Attach to From 3020 a-1 for each charge)

The University of the State of New York
The State Education Department
School District Employer-Employee Relations Unit
Education Building, Room 510, West Hall
Albany, New York 12234

Supplemental Notification of Board Vote
Determination of Probable Cause
Section 3020-a, Education Law

To: the Commissioner of Education

This finding of probable cause as to the charge numbered II was affirmed by the following board members, constituting a majority:

1. Joseph Ribando	4. Bernard Modder	7. _____
2. Robert Quinn	5. Constance Jones Phelps	8. _____
3. Keld Alstrup	6. Michael Santoianni	9. _____
(names)	*(names)*	*(names)*

The following board members, constituting a minority, voted against a finding of probable cause:

1. _____	3. _____
2. _____	4. _____
(names)	*(names)*

The following board members were absent:

1. _____ 3. _____

2. _____ 4. _____
(names) *(names)*

There is one vacancy on the Board

9/8/92
(Date)

/s/
(Signature of District Clerk or Secretary of the Board of Education)

NOTE: There should be a separate vote as to each charge.

Form 3020-a-1-B

(Attach to From 3020 a-1 for each charge)

The University of the State of New York
The State Education Department
School District Employer-Employee Relations Unit
Education Building, Room 510, West Hall
Albany, New York 12234

Supplemental Notification of Board Vote
Determination of Probable Cause
Section 3020-a, Education Law

To: the Commissioner of Education

This finding of probable cause as to the charge numbered III was affirmed by the following board members, constituting a majority:

1. Joseph Ribando	4. Bernard Modder	7. _____
2. Robert Quinn	5. Constance Jones Phelps	8. _____
3. Keld Alstrup	6. Michael Santoianni	9. _____
(names)	*(names)*	*(names)*

The following board members, constituting a minority, voted against a finding of probable cause:

1. _____	3. _____
2. _____	4. _____
(names)	*(names)*

The following board members were absent:

1. _____ 3. _____

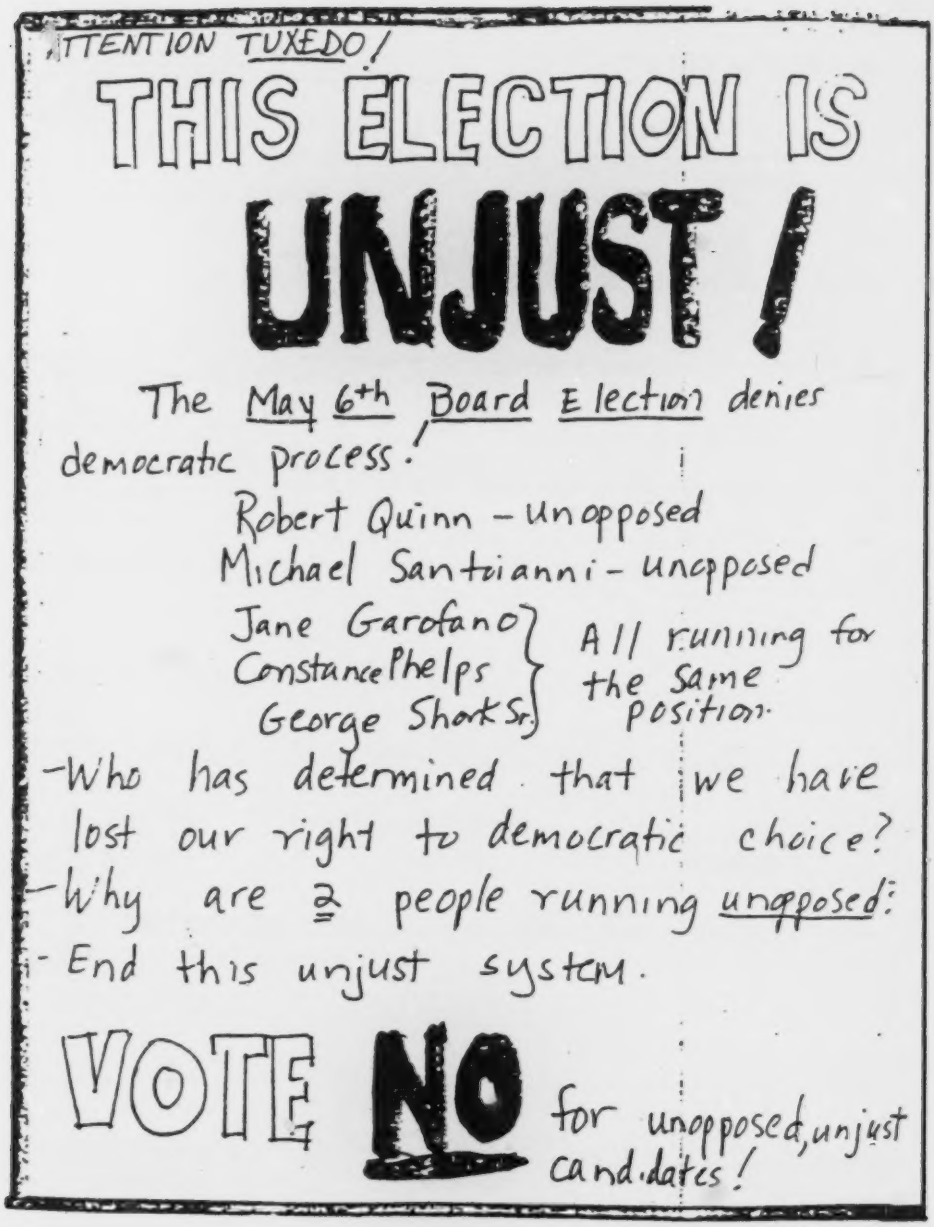
2. _____ 4. _____
(names) *(names)*

There is one vacancy on the Board

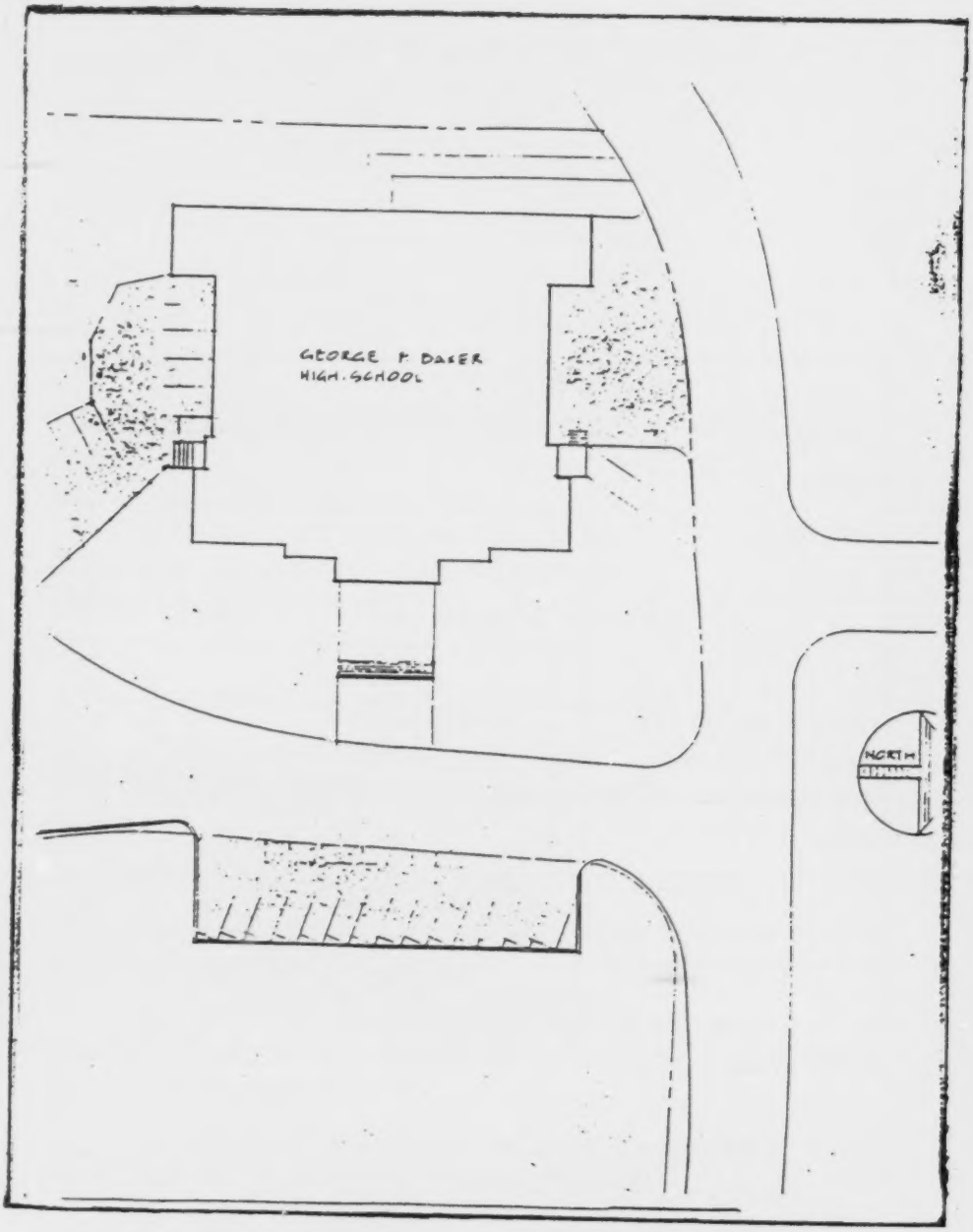
9/8/92
(Date)

/s/
(Signature of District Clerk or Secretary of the Board of Education)

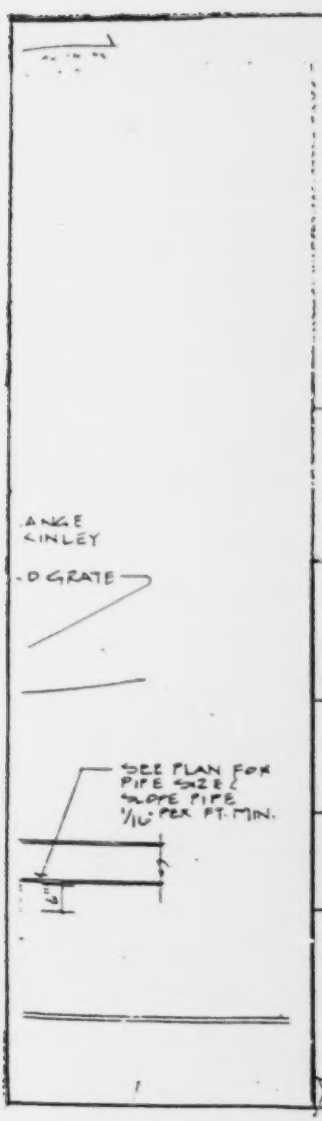
NOTE: There should be a separate vote as to each charge.


ATTENTION TUXEDO!
THIS ELECTION IS
UNJUST!
The May 6th Board Election denies democratic process!
Robert Quinn - unopposed
Michael Santoianni - unopposed
Jane Garofano
Constance Phelps
George Shark Sr.
All running for the same position.
-Who has determined that we have lost our right to democratic choice?
-Why are 2 people running unopposed?
-End this unjust system.
VOTE NO for unopposed, unjust candidates!

* This is a reproduction, reduced to 56 percent, of the flier distributed by Brian Cullen on May 6, 1992, and attached to the Complaint as Exhibit B.



* Pages 79a and 80a contain a reproduction, reduced to 56 percent, of the diagram attached to the Complaint as Exhibit C.



JOB NUMBERS:
44-19-03 02-0-001-003
44-19-03 02-0-002-003
44-19-03-02-0-003-003

SITE PAVING & DRAINAGE
TUXEDO UNION FREE SCHOOL DISTRICT
TUXEDO NEW YORK

SITE PLAN

CLARK AND WARREN ARCHITECTS
BOICE ROAD · HYDE PARK NEW YORK · 12538

SCALE 1" = 40'-0"
DRAWN
DATE 2/15/71
REVISED

DWG NO.
SP1
OF 1

APPENDIX F (cont'd)

Answer to Complaint, filed May 27, 1993, with Exhibits A and B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRIAN CULLEN, Plaintiff, — against — DR. HERBERT FLIEGNER, JOSEPH RIBANDO, ROBERT QUINN, KELD ALSTRUP, BERNARD MODDER, CONSTANCE JONES PHELPS, MICHAEL SANTOIANNO and THE TUXEDO UNION FREE SCHOOL DISTRICT, Defendants.	ANSWER 93 Civ. 2569 (CLB)

Defendants, by their counsel, Guazzo, Perelson, Rushfield & Guazzo, hereby submit their Answer to the Complaint herein as follows:

AS TO THE FIRST CAUSE OF ACTION

1. Admit the allegations of paragraphs numbered 1, 3, 4, 6, 7, 8, 12 and 13 of the Complaint.

2. Admit the allegations of paragraph numbered 2 of the Complaint, except deny that the Tuxedo Union Free School District is located in Goshen, New York.

3. Deny the allegation of paragraphs numbered 5, 9, 43, 44, 47, 48, 49, 50, 51 and 52 of the Complaint.

4. Deny the allegations of paragraph numbered 10 of the Complaint, except admit that no formal disciplinary proceeding

under Education Law § 3020-a was brought against plaintiff until February 15, 1990, when the defendant District filed two charges against plaintiff pursuant to Education Law § 3020-a and that plaintiff was found guilty of one of the two charges after a hearing and was fined $1,250.00 by a three-member panel. The decision of the panel, including a recitation of the charges, is annexed hereto as Exhibit A and the Court is respectfully referred to said decision for a full and complete statement of the charges and panel decision.

5. Deny the allegations of paragraph numbered 11 of the Complaint, except admit that on February 13, 1992, the District filed two charges against plaintiff pursuant to Education Law § 3020-a, that by decision of July 21, 1992, announced on or about September 1, 1992, the panel found the plaintiff guilty of both charges and that by written decision of the panel dated October 26, 1992, plaintiff received a penalty of four months suspension without pay. The July 21, 1992 and October 26, 1992 decisions of the panel, including a recitation of the charges is annexed hereto as Exhibit B and the Court is respectfully referred to said decision for a full and complete statement of the charges and panel decision.

6. Deny the allegations of paragraph numbered 14 of the Complaint, except admit that a hearing on the charges referred to in paragraph numbered 12 of the Complaint was commenced before a three-member panel on February 26, 1993, at which time the District presented its evidence in support of the charges. The Court is respectfully referred to the transcript of these proceedings ("Transcript"), annexed as Exhibit A to the May 10, 1993 Affidavit of David S. Shaw previously submitted to the Court in opposition to plaintiff's application for a preliminary injunction for an accurate and complete statement of the testimony submitted in support of the charges.

7. Deny the allegations of paragraph numbered 15 of the Complaint, particularly deny the characterizations of testimony therein and respectfully refer the Court to the Transcript for an accurate and complete statement of the testimony of defendant Fliegner. Defendants admit that neither on or before May 6, 1992 did anyone actually physically measure the distance of 100 feet from the school entrance on behalf of the District.

8. Deny the allegations of paragraphs numbered 16, 17, 18, 19, 20, 21, 22, 23, 24, 25 and 26 of the Complaint and respectfully refer the Court to the Transcript for an accurate and complete statement of the testimony of defendant Fliegner.

9. Deny the allegations of paragraph numbered 27 of the Complaint and respectfully refer the Court to Exhibit B to the Complaint for an accurate and complete statement of the contents of the flier, except admit that two of the six Board members who voted in support of a finding of probable cause for the Education Law § 3020-a charges against plaintiff were identified in the flier, as were three other individuals running for a Board position, none of whom were members of the Board who voted on the finding of probable cause.

10. Deny the allegations of paragraphs numbered 28, 29, 30 and 31 of the Complaint and respectfully refer the Court to the Transcript for an accurate and complete statement of the testimony of District Clerk Nancy Bourke.

11. Deny the allegations of paragraphs numbered 32, 33, 34, 35 and 36 of the Complaint and respectfully refer the Court to the Transcript for an accurate and complete statement of the testimony of District Business Administrator Joseph Zanetti.

12. Deny the allegations of paragraphs numbered 37, 38, 39 and 40 of the Complaint and respectfully refer the Court to the Transcript for an accurate and complete statement of the testimony of Police Officer Kelly.

13. Deny the allegations of paragraph numbered 41 of the Complaint, except admit that on September 1, 1992, defendant Fliegner telephoned the plaintiff and asked whether plaintiff could meet with him that day for a meeting defendant Fliegner had requested, that the plaintiff was unable to attend such a meeting and that during the conversation, defendant Fliegner advised the plaintiff that he would be reviewing certain matters with the Tuxedo Board of Education, including the events of May 6, 1992.

14. Deny the allegations of paragraph numbered 42 of the Complaint and respectfully refer the Court to the Transcript for an

accurate and complete statement of the testimony of defendant Fliegner.

15. Deny the allegations of paragraph numbered 45 of the Complaint, and respectfully refer the Court to the Transcript for an accurate and complete statement of the representations of the parties and agreements and stipulations of the parties, except admit that plaintiff moved to dismiss the charges on the very same constitutional ground set forth in the Complaint.

16. Deny the allegations of paragraph numbered 46 of the Complaint, except deny knowledge or information sufficient to form a belief as to the truth of the allegation that on April 16, 1993, plaintiff's counsel was advised by telephone by the chairman of the panel that the motion was denied by a 2 to 1 vote.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

17. The Complaint fails to state a claim upon which relief may be granted.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

18. The Court must abstain from deciding this action and dismiss this action under the doctrine enunciated by the United States Supreme Court in *Younger v. Harris*, 401 U.S. 37, 27 L.Ed.2d 669, 91 S.Ct. 746 (1971).

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

19. Plaintiff has waived the assertion of the claims set forth in the Complaint before this Court.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

20. The Court lacks jurisdiction over the Complaint as it fails to assert a justiciable claim.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

21. The individual defendants are immune from suit as against the plaintiff's claims under the doctrine of Qualified Immunity.

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE

22. The defendant Tuxedo Union Free School District and its Board of Education are immune from suit as against the plaintiff's claims under the doctrine of Absolute Immunity.

WHEREAS, the defendants demand a judgment dismissing the Complaint in all respects and granting the defendants such other and further relief as may be just and proper, including an award of their costs and reasonable attorney fees.

Respectfully submitted,

GUAZZO, PERELSON,
RUSHFELD & GUAZZO
Attorneys for Defendants
207 East 31st Street
New York, New York 10016
212/696-9500

By _____/s/_____
Mark C. Rushfield (MCR 0231)

N.Y. State Education Department
Division of Employer-Employee Relations File # 2205

In the Matter of the Charges By

Tuxedo Union Free School District

vs.

Brian Cullen

ARBITRATORS: Arthur T. Jacobs, Chairperson
Ernest Cannava, Board Panel Member
Joseph E. Kolman, Employee Panel Member

PARTICIPATION: For the District

David S. Shaw, Esq.
Carmine Antonelli, High School Principal

For Mr. Cullen

Paul H. Janis, Esq.
Brian Cullen, Teacher

HEARING: October 29, 1990 and January 9, 1991. Briefs received February 11, 1991

THE CHARGES

The District filed two charges against Mr. Cullen on February 15, 1990. The first:

> . . . that on or about November 5, 1989, (he) . . . in violation of previous directives given to him requiring him to give two (2) weeks notice to the Building Principal and to gain approval from the Building Principal prior to taking students on field trips . . . did, without authorization, take students from his Physics Class on an airplane to do physics experiments.

The second:

> (He) . . . was "mooned" by (exposed to the buttocks of) six (6) students in his Physics Class on December 1, 1989 following an invitation by (him) for the students to do so, issued by him in class during the month of September, 1989.

CHARGE I

Mr. Cullen did take four students in his physics class on an airplane ride and conducted physics experiments during the trip without informing Mr. Antonelli in advance and without District authorization. He did so on a non-school day, Sunday, because he believed that they would benefit from observing such experiments first hand.

Mr. Antonelli testified that on September 27, 1983 he sent a memorandum to Mr. Cullen in which he stated:

> It is against school policy to take students out of school without going through the proper procedure. A field trip request form must be filed at least two weeks prior to any trip and a permission slip for each student is necessary to release him or her from school for insurance purposes.

He also presented Mr. Cullen on December 23, 1988 a memorandum which Mr. Cullen signed and which stated:

> As per our conversation, you are in no way to take your Physics class on an airplane trip to do experiments. This is not, and will not be, approved or condoned by the District.

In addition, the District presented the statements in the Faculty Handbook dealing with field trips:

> The trip must be approved by the Principal and the Superintendent of Schools.

Specifically, with non-school sponsored trips:

a. School facilities and class time may not be used for the purpose of promoting such a trip unless permission has

been obtained from the Superintendent of Schools. This prohibition includes class announcements . . .

b. Any communication with students regarding a non-sponsored trip shall take place outside of the school day.

c. Announcements and communications with students and parents must mention that the trip is not a course requirement, and that the school system is not responsible for loss of property or personal injury. It must also be stated that the trip has no connection with the school or the Tuxedo School District.

Under STUDENT TRIPS SPONSORED BY EMPLOYEES are two sentences:

> Occasionally staff members will do this on their own and not as part of an organization. These trips are not under district sponsorship or control, and the district accepts no responsibility or liability for such trips.

After he learned of the airplane incident, Mr. Antonelli questioned Mr. Cullen, who told him that the ride was not on school time and not part of the school's program. Mr. Cullen and Mr. Antonelli, however, testified that the experiments conducted on the ride are part of the physics curriculum.

Mr. Cullen stated that he asked his class if any would like to do physics experiments in an airplane and when seven of his 16 students said they would, he "felt obligated to give these kids their money's worth" and he told them that "I'll go and arrange it" (t. p. 86). He testified that he called their parents and told them that the trip would be on his time and that the school was not involved.

He did not believe at that time that he was violating Mr. Antonelli's memorandum of December 23, 1988, which he had signed, because he had taken the liability upon himself and believed that in doing so he met the guidelines in the Faculty Handbook for STUDENT TRIPS SPONSORED BY EMPLOYEES.

He acknowledged that he had requested permission to take students in an aircraft in 1988 to do experiments and that his request had

been denied. He also admitted that the 1989 trip had been planned on school time and in school facilities and that he did not discuss insurance with the parents or ask then to sign waivers holding the District free of liability should there be an accident

After the first hearing in this case Mr. Cullen contacted the pilot of the plane and learned that his passengers are covered by liability insurance. A copy of the policy shows that it provided a maximum of $100,000 bodily injury and property damage per individual.

One of the four students who took the airplane ride testified that he did not know if Mr. Cullen contacted his parents for permission, but that he himself told them he would be going up in an airplane with Mr. Cullen and friends to conduct physics experiments. A second student knew that Mr. Cullen had talked to his mother about the trip before she gave permission.

CHARGE II

Mr. Cullen was "mooned" by six students on December 1, 1989. He was "outraged", chastised them and immediately reported the incident to the Dean of Students with the recommendation that they be given a one day in-school suspension. He testified that the concept of "mooning" came up in his all male class while he was conducting an experiment involving astronauts and one of the students exclaimed "Look at his bulge" or "Check out the bulge". Mr. Cullen reprimanded him and spent 10-15 minutes, he said, telling the class not to "bring ('perverted') things like that into physics class".

At the close of his scolding:

> . . . because either we were on the moon with Galileo (the experiment) or something happened, the word "moon" was in the air, and I said "What will it be next, we'll be mooning each other?"

When he asked the students why they "mooned", they answered "You told us to", but he cannot recall ever doing so. He agreed that he had told his students at the beginning of the school year that whatever happened in the class would be "confidential".

Mr. Antonelli testified that when he investigated the "mooning" incident, one of the students, Daniel Devine, told him that Mr. Cullen in the context of confidentiality in his class had told the students that they could "even moon". All the other students who had "mooned" told him essentially that they believed they could do anything in Mr. Cullen's class and it would be kept confidential. He testified also that the students agreed that Mr. Cullen had never told them to "moon".

Mr. Devine testified that Mr. Cullen had not given the class permission to "moon". However, when the bulge in the pants incident occurred, Mr. Cullen first told them that the remark was "stupid" and then:

> . . . looked around and saw it was all guys. He said, oh, it's all guys in the class . . . We can say anything . . . that you wouldn't say if there was a girl in the room. We can even moon each other.

He added on examination by a panel member that he did not take Mr. Cullen's statement "literally":

> We took it as he was just trying to express the fact that there were guys in the classroom and that, you know, kind of like building our confidence . . . I don't think many people heard it maybe, because people I talk to don't remember him saying it. We were all spread around the TV.

And when asked by the panel member "Did you think in any way Mr. Cullen encouraged you and your friends to 'moon'?", he answered "No".

Mr. Jenkins, another of the six students, testified that Mr. Cullen had not given them permission to "moon", that it was a "free", an "easy going class" and so "some people probably thought they could get away with it".

Mr. Andrew Sugar, a student who did not "moon", testified that Mr. Cullen did not give the class permission to "moon". He did remember that the subject of "mooning" came up during the Galileo experiment and the remark about the "bulge", but he could not

remember in what context. And he stated that when the "mooning" occurred Mr. Cullen "was shocked".

Mr. Antonelli and the students all testified that Mr. Cullen is an excellent teacher, and Mr. Cullen promised never to take his students up in an airplane again.

POSITIONS OF THE PARTIES

In the Brief filed on his behalf Mr. Cullen, apropos the first charge, the airplane trip:

> concedes that . . . he did not take sufficient steps to place this activity outside the auspices and responsibility of the District, and that, therefore, he was bound by the Field Trip Policy; and, in fact, stated on the record that he would not attempt to make such an arrangement for his class again.

This breach of the Policy, however, argues the Union, was only a technical violation. It urges the panel:

> . . . in assessing the appropriate penalty, (to) consider that the airplane ride to do physics experiment was done solely for the benefit of respondent's students and that the respondent did not personally gain financially or otherwise from the trip. . . . testimony of his students, and the general testimony of Principal Antonelli show beyond any doubt that respondent is an enthusiastic teacher who works his students hard and leaves them with a positive lasting school experience when they leave his science class. Respondent's transgression herein is one of over enthusiasm to make his science class interesting and exciting for his students, not one of neglect of duty . . .

Since the purpose of 3020-a "is not to punish teachers but to determine fitness", the Union suggests that Mr. Cullen's penalty for this violation be simply a formal letter of reprimand, it to include directives that all future trips by him "must strictly comply with the rules, regulations and policies of the District". It argues against suspension, because even the District has acknowledged by not

suspending him itself that he is a valued teacher and his students should not be deprived of his teaching.

It also argues against a financial penalty because it believes that would "stifle his enthusiasm and independence" and because it asserts the District did not take "the time to counsel respondent about its concern in this matter".

The District does request a severe financial penalty for what it characterizes as "insubordination and/or conduct unbecoming a teacher and/or incompetence": Mr. Cullen knew from being repeatedly told "no" when he requested permission to take his students on airplane trips to conduct experiments that actually doing so was an act of insubordination; he claimed to have called all the parents and received permission from them, but one of his own witnesses testified that Mr. Cullen had not contacted his parents; he placed the lives of the students at risk and exposed the District to contingent liability; and the same experiments could have been performed in an elevator without creating these risks and liability.

On Charge 2 the District asserts that the testimony of three students clearly shows that:

> the students' action of mooning was a result of, and caused by, the Respondent's invitation to the students that such behavior would be allowed in his class.

It contends that Mr. Cullen admits to making a "mooning" comment and six students did "moon", so Mr. Cullen's statements and comments in class must be viewed "as a substantial contributing factor in causing the mooning incident. . .". He should, therefore, be disciplined for "inviting deviant behavior in a class room and lacking appropriate student disciplinary standards".

ANALYSIS

Let us state at the outset that we consider the "mooning" incident trivial, inconsequential, of no significance. It was an act that occurred in one class room, only once, and was never duplicated by any students in the school ever again. It, therefore, did not cause any damage to the school's teaching staff or administration or the

content of the school program. There was no negative impact on the conduct of other students.

In addition, when "mooned" Mr. Cullen certainly reacted as though he had never condoned "mooning". He was "shocked", to quote one of the students present. He certainly proved that he was by the lecture he gave the students against bringing such "perverted" acts to his class room, by immediately reporting the incident to the Dean of Students, and by himself recommending a one-day suspension for the students who engaged in the act.

The student witnesses all testified that he had not authorized "mooning". If some students thought that they could "moon" because at one time he mentioned it in the context of an experiment and had told them that whatever went on in the class room would be "confidential", they leaped to a conclusion which Mr. Cullen obviously never intended and for which they have themselves primarily to blame. They merited the suspension they received.

Mr. Cullen pleads guilty to Charge 2, the airplane ride. This violation of established policy, which he well knew, having had identical airplane trips rejected twice before and having signed a statement summarizing the prohibition, is serious. He did put the lives of four students at risk and subjected the District as well as himself and the pilot of the plane to a tremendous liability.

As penalty, we do not favor suspension because obviously that would be a grave loss to the students in his classes. He is a dedicated, competent, and enthusiastic teacher. Nor do we believe a reprimand is sufficiently commensurate with the seriousness of the violation and the potential risks imposed on the students, their families, and the District. We disagree with the Union's contention that he was not adequately counseled about the concerns of the District. Twice before he had been counseled against taking his students on airplane trips.

Normally, we would recommend a substantial fine. In this case, however, we believe the fine should only be large enough to underline the seriousness of the violation and be a deterrent to any further gross violation by Mr. Cullen of District policies. Given the fine we recommend here, the penalty then would undoubtedly be

substantially greater. But we also believe that the fine should not be punitive. Mr. Cullen is clearly a very fine teacher; such teachers should be encouraged and even cosseted. And we believe that he has learned his lesson from this unfortunate incident.

RECOMMENDATIONS

1. Mr. Cullen is guilty of Charge I and should be fined one thousand two hundred and fifty dollars ($1,250).

2. Charge 2 against Mr. Cullen should be dismissed.

/s/
Chairman

/s/
Board Panel Member

/s/
Employee Panel Member

STATE OF NEW JERSEY)
) ss:
COUNTY OF UNION)

Sandra J. Meckler, being duly sworn, deposes and says that:

She is the Impartial Panelist in a case arising under Section 3020-a of the New York Education Law between the Tuxedo Union Free School District and Brian Cullen, a tenured teacher, and that the above Opinion, Determination and Recommendation and signature are mine.

/s/

/s/
Sworn to me this 21st day
of July, 1992

ALFRED M. SCHNEIDER
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires October 3, 1994

STATE OF N.Y.)
) ss:
COUNTY OF DUTCH)

, being duly sworn, deposes and says that:

He is the Board Panelist in a case arising under Section 3020-a of the New York Education Law between the Tuxedo Union Free School District and Brian Cullen, a tenured teacher, and that the above Opinion, Determination and Recommendation and signature are mine.

/s/

/s/
Sworn to me this 24th day
of July, 1992

Notary Public, State of New York
No. 499 7623
Residing in Dutchess County
Commission Expires 6/15/94

STATE OF NEW YORK)
) ss:
COUNTY OF PUTNAM)

, being duly sworn, deposes and says that:

Mary Uhle is the Employee Panelist in a case arising under Section 3020-a of the New York Education Law between the Tuxedo Union Free School District and Brian Cullen, a tenured teacher, and that the above Opinion, Determination and Recommendation and signature are mine.

/s/

/s/
Sworn to me this 24 day
of July, 1992

[Notary Stamp]

STATE OF NEW YORK
STATE EDUCATION DEPARTMENT
SCHOOL DISTRICT EMPLOYEE-EMPLOYER RELATIONS UNIT

In the Matter of
TUXEDO UNION FREE SCHOOL DISTRICT, TUXEDO HIGH SCHOOL,
Complainant,

Against

BRIAN T. CULLEN,
Respondent - Tenured Employee
Pursuant to Section 3020-a Education Law
Proceeding (File #2,496)

BEFORE: SANDRA J. MECKLER, ESQ., IMPARTIAL CHAIRMAN
MR. DENNIS GEISLER, BOARD PANEL MEMBER
MS. MARY E. UHLE, EMPLOYEE PANEL MEMBER

APPEARANCES:
FOR THE TUXEDO UNION FREE SCHOOL DISTRICT: SHAW & SILVEIRA, ESQS., BY: DAVID S. SHAW, OF COUNSEL
FOR THE RESPONDENT, BRIAN T. CULLEN: JAMES R. SANDNER, ESQ., BY: PAUL JANIS, ESQ.

OPINION OF THE CHAIRMAN

Background

Pursuant to Section 3020-a of the Education Law and Part 82 of the Rules and Regulations of the Commissioner of Education, I was designated as Impartial Chairman of the above-listed tripartite panel to hear and determine whether the Respondent is guilty of certain charges which were preferred against him by a vote of the Board of Education of Tuxedo Union Free School District

(District). At the District's request and without objection by Respondent, the issue of penalty was reserved for determination in a separate hearing, if required by the findings herein.

Throughout the course of these proceedings, both the Board and the Respondent had representation by counsel, examined and cross-examined witnesses, presented documentary evidence and submitted post-hearing briefs in support of their positions. A transcript of the hearing was made in accordance with the law.

The charges are as follows:

CHARGE I MISCONDUCT AND/OR CONDUCT UNBECOMING AND/OR NEGLECT OF DUTY AND/OR INCOMPETENCE AND/OR INSUBORDINATION

In that on or about December 4, 1991, Mr. Brian Cullen, a tenured teacher, while in the high school cafeteria during the fifth period, in the presence of upper elementary grade level students, ignited an aerosol spray creating a flame-thrower type effect.

In the event of a finding of guilt on the above-stated charge, the teacher's prior disciplinary record, if any, shall be introduced for the Section 3020-a Panel's consideration in determining the appropriate discipline.

CHARGE II MISCONDUCT AND/OR CONDUCT UNBECOMING AND/OR NEGLECT OF DUTY AND/OR INCOMPETENCE AND/OR INSUBORDINATION

In that on or about January 17, 1992, Mr. Brian Cullen, a tenured teacher, while in the high school cafeteria during the fifth period, the presence of elementary grade level students, ignited an aerosol spray creating a flame-thrower type effect. This conduct was undertaken after receiving directive from Elementary School Principal, Jan Hammond, not to repeat the flame igniting activity which occurred on or about December 4, 1991.

> In the event of a finding of guilt on the above-stated charge, the teacher's prior disciplinary record, if any, shall be introduced for the Section 3020-a Panel's consideration in determining the appropriate discipline.

At the hearing, the parties stipulated as follows:

> On December 4, 1991 and January 17, 1992, the Respondent held a cigarette lighter in an open position and pumped a single spray from a two ounce Binaca breath spray which ignited for less than one second. This demonstration was conducted in the high school cafeteria before fourth, fifth, and sixth grade students while Mr. Cullen was serving as cafeteria supervisor, for which he was compensated $20. per day, pursuant to a provision in the collectively negotiated agreement between the Teacher's Association and the District.

The District's Position

With respect to Charge I, the District concedes that Respondent clearly believed that his Binaca demonstration was safe. The District, however, maintains that it is not challenging the demonstration for its actual danger at that moment, but rather, because of the dangerous elements used (a lighter and an aerosol spray), the improper setting involved, and most importantly, the potentially dangerous effects such a demonstration could have on young students who might attempt to replicate it.

In this regard, the District points to the testimony of the elementary school principal, Jan Hammond. Upon hearing of the demonstration from certain students, Ms. Hammond said she went to every elementary school class on December 4, 1991, in order to stress the dangers involved in igniting matches or lighters. Ms. Hammond further testified that the students appeared confused as to the nature of product used in the experiment, calling it a "magic flame" and telling her that it was "a spray and aerosol can or hair spray". [Tr. 14] Thus, while Binaca can only spray for a brief moment, the District emphasizes that many over-the-counter products are stored in aerosol cans that can continuously spray, thereby creating the potential for disastrous consequences if the demonstration was repeated with some other product.

The District also argues that the demonstration lacked the safeguards of a typical science experiment since (1) Respondent performed it in the cafeteria, rather than in a classroom with safety apparatus, and (2) Respondent failed to warn of the dangers in attempting to duplicate his actions. In this regard, the District notes that in the cafeteria setting, many students beyond those in the group the Respondent was addressing would be able to observe the cause and effect of the demonstration, without knowing specifically how it was created.

With respect to Charge II, the District argues that Ms. Hammond credibly testified that she warned Respondent on December 9, 1991 not to perform the Binaca demonstration again; despite such warning, Respondent admittedly repeated it on January 17, 1992, thereby justifying a finding of insubordination. Specifically, Ms. Hammond testified that, after attending an administrator's meeting on December 9, 1991, at which she learned the exact nature of the product involved, she called Respondent aside at the cafeteria condiments counter and informed him not to conduct any such activity again. Ms. Hammond said she learned in a meeting on January 23, 1992 that Respondent had again performed the demonstration. She then conferred with the school superintendent, leading to the filing of the instant charges on February 13, 1992.

Accordingly, the District maintains that a preponderance of the evidence supports a finding of guilt on both charges.

Respondent's Position

a. Evidentiary Standards

At the outset, Respondent argues that the charges against a tenured teacher, in order to be sustained, must be substantial and not picayune, citing *Tessier v. Board of Education U.F.S.D.*, No. 5, 19 N.Y.2d 680 (1967) (directing reinstatement of teacher who was dismissed for making advances towards a student); *Matter of Walsh*, 3 Ed. Dept. Rep. 159 (even if proven, charges would not be sufficient basis for dismissal); and *Matter of Brink*, 7 Ed. Dept. Rep. 9 (to remove a tenured teacher, the charges must be both substantial and substantiated). Citing Richardson on Evidence,

Tenth Edition, Section 97, 1973, Respondent further argues that, under the "fair preponderance" test, if the proof is equally balanced between the parties, the decision must go against the party upon whom the burden of proof rests, i.e. the District herein.

Respondent also maintains that the District's evidentiary burden cannot be met by hearsay testimony alone, citing *Matter of Board of Education of Highland Falls - Fort Montgomery Central School District v. Nicolacopoulos,* 22 Ed. Dept. Rep. 96 (hearsay alone is insufficient to sustain a charge where Respondent has been precluded from cross-examining the source of the allegations contained therein); and *Matter of Erdman v. Ingraham,* 28 A.D.2d 5, 280 N.Y.2d 865 1967 (hearsay evidence may not be used by an administrative tribunal in such a manner as to deprive a party of the right to a fair hearing.)

Furthermore, Respondent maintains that the District, in order to establish insubordination, must prove that his actions were in defiance of a direct order, citing *Matter of Board of Education of Community School District No. 24 of the City School of the City of New York v. Scwartzberg,* 30 Ed. Dep't Rep. 445 (1991) (when relying upon a prior reprimand or directive to a teacher, petitioner must prove that such warning provides more than a vague direction for future conduct).

b. The Proof

In applying these standards to the proof adduced at the hearing, Respondent argues that the District failed to meet its evidentiary burden. The experiment, according to Respondent, was conducted to instill a sense of excitement about science and, as such, did not rise to a level of chargeable conduct under the Education Law.

Specifically, Respondent asserts that he is a high school science teacher who strives to bring science out of the classroom and into everyday experience. In his voluntary position as an elementary school lunchroom monitor, he one day approached a table with about five boy scouts and jestfully wagered one hundred dollars that they could not light a fire without matches. He testified that he performed the Binaca experiment for the boys a week later,

saying "You know what this is? You can't use it in lighting a fire." [Tr. 43]

Respondent maintains that the experiment poses no threat to safety and that there is no reason to assume that the students felt otherwise, given universal warnings to children about fire and matches. Furthermore, Respondent claims that the District itself did not deem it a serious event, since Ms. Hammond, even if her testimony is credited, did not speak to him about it for five days and never issued him a written warning. Instead, Respondent points out, Ms. Hammond wrote him a note dated January 7, 1992, praising him for his idea of taking photographs of "the best table" in the lunchroom. Thus, Respondent questions why such a minor action would warrant a written note, while an allegedly important one required only a conversation by the lunchroom condiments counter.

Respondent also claims that he is not guilty of insubordination since he complied with the only directive he received about performing the experiment. While he recalls Ms. Hammond telling him at some point during his lunchroom assignment not to accept "gummy bears" from the children, Respondent denies that she told him not to do the Binaca demonstration. Rather, he claims that the first time he was ordered not to perform the experiment was in a letter from the high school principal dated January 17, 1992, and since that date, he has not done so. Ms. Hammond's testimony should be discredited, according to Respondent, because at the time of these events, the Board's decision regarding Ms. Hammond's tenure was pending.

Discussion

Contrary to Respondent's assertion, I am not persuaded that the experiment was of such minor significance as to fall outside the parameters of chargeable misconduct. Although he may have been motivated on December 4, 1991 by a desire to intellectually stimulate the students involved, Respondent clearly failed to exercise sound judgment in performing the experiment as he did. Aside from how safe this particular experiment may be in a controlled setting, the mere igniting of a pocket lighter by a table of children in an elementary school lunchroom poses safety issues.

Furthermore, other than mentioning that "you can't use it in lighting a fire", Respondent neither explained the nature of the demonstration to the students, nor cautioned them not to repeat the experiment, particularly with a different aerosol product.

Nor do I agree that the District placed little significance on Respondent's actions. Ms. Hammond credibly testified that after speaking to some of the students and an aide shortly after the December 4, 1991 experiment, she proceeded to speak with the high school principal, Carmine Antonelli. She testified that "I asked him if he wanted me to write up the incident because of the—with my students being at such an impressionable age I was highly concerned about this, and he said that he would take care of it." [Tr. 15] She said she then spoke to every elementary school class, kindergarten through six, to warn them of the dangers involved. On Monday, December 9, 1991, Ms. Hammond testified that she attended an administrator's meeting where the experiment was discussed and decided that she "wanted to make sure that [she] had covered very clearly [her] feelings as the elementary principal." [Tr. 21] Thus, apparently learning that the high school principal had taken no action, she went to the lunchroom, where she asked Respondent to come aside to the condiments counter. She says she then told him that "These students in my elementary school are at a very impressionable age and that he is not to do any kind of activity during the lunch hour with my students there using flame or fire or anything of that nature." [Tr. 22] Clearly, these are not the actions of an administrator unconcerned by Respondent's actions.

Therefore, I reject the contention that the charges were too picayune to amount to chargeable misconduct and find that Respondent is guilty of misconduct, conduct unbecoming a teacher, and neglect of duty with regard to the December 4, 1991 Binaca experiment.

In crediting Ms. Hammond's testimony, I note that she was a forthright witness, who answered the questions in a consistent and complete manner. In contrast, Respondent was vague, inconsistent, and evasive throughout his testimony. For example, although Respondent said that he had no recollection of dates because he

"doesn't keep a diary", he remembered that he never performed the Binaca experiment after reading Mr. Antonelli's letter dated January 17, 1992, which he thought he received in December. [Tr. 51-52]. This, of course, is inconsistent with the parties' stipulation that Respondent performed a second Binaca demonstration on January 17, 1992. Respondent's confused and inconsistent rendering of the events is further exemplified by this excerpt of his testimony:

> Q. I would like to ask you if you can recall having said this to Jan Hammond, February 13, 1992 at about 8:30 in the morning: "Oh, Mrs. Hammond"—this is you speaking—"I got a letter after you told me not to do the experiment any more. I didn't. Just like when you told me not to eat any more in the cafeteria, I didn't. You know, they are trying to bring me up on a 3020-a charge again and I don't want that again. You know I didn't do it again once you told me not to."
>
> Did you say that to her?
>
> A. 8:30 in the morning? I am, I believe, in the middle of the first period. How could I have? But I think you are referring to the conversation I had with her, and I did ask her, "Why are you saying these things that you told me about Binaca?"
>
> Q. That wasn't my question. You heard the statement which I made which I attributed as being your statement, your words —
>
> A. Could you just reiterate it?
>
> Q. Yes. "Oh, Mrs. Hammond, I got a letter, after you told me not to do the experiment any more. I didn't. Just like when you told me not to eat any more in the cafeteria, I didn't. You know, they are trying to bring me up on a 3020-a charge again and I don't want that again. You know I didn't do it again once you told me not to."
>
> A. The last part sounds valid, but the first part doesn't. Oh, I got a letter? Say that again? Oh, I got a letter about doing the Binaca after you told me"? That's impossible.
>
> Q. Yes.

A. That's impossible.

Q. I am not asking you what's possible or not possible. Just whether you said these words.

A. I didn't say that.

Q. Did you say to her, "You know I didn't do it again once you told me not to"?

A. Yes, I said that. No, I didn't—say that again?

Q. "You know I didn't do it again once you told me not to."

A. The Gummy Bears?

Q. No, I am referring to the experiment in the cafeteria.

Thus, in a question that clearly concerned the 3020-a charges arising from the experiment, Respondent agrees that he said to Ms. Hammond, "You know I didn't do it again one you told me not to." Apparently recognizing where this testimony has led, Respondent then attempts to appear confused by the line of questioning.

This leads to the issue of insubordination in Charge II. Even apart from the above-quoted testimony, Respondent clearly admitted that he performed the experiment again despite the administration's position:

Q. What do you remember the children saying to you when you repeated the incident?

A. Whenever I saw them, the ones with the hundred dollar bet, they said do it; do the experiment. And after I was told not to do it. I said, "I can't. I got word from above, I can't do it down here."

Q. But you did do it again after they said to you, "Brian, come on, do it again, do it again." You did repeat it at least the second time?

A. I admitted to that already, that I did it, that I did the Binaca experiment.

Q. When they were saying, "Brian, come on, do it again." were you hesitating about doing it again?

A. Yes, because you don't want to burn a grabber. You don't hang the picture up and then point it out. You let it ferment. You don't do it over and over again and then it isn't a grabber any more.

Thus, even had I not credited Ms. Hammond's testimony, Respondent's own testimony establishes that he had received a clear directive not to repeat the experiment, which he disregarded. In performing the demonstration for the second time, I therefore find on Charge II that Respondent was guilty of insubordination, as well as misconduct, conduct unbecoming a teacher, and neglect of duty.

In accordance with the foregoing Opinion, I make the following Determination and

RECOMMENDATION:

1) Respondent, Brian T. Cullen, a tenured teacher in the Tuxedo Union Free School District is guilty of misconduct, conduct unbecoming a teacher, and neglect of duty with respect to Charge I;

2) Respondent, Brian T. Cullen, is guilty of misconduct, conduct unbecoming a teacher, neglect of duty, and insubordination with respect to Charge II;

3) The penalty shall be determined in a separate hearing scheduled for August 11, 1992.

Dated: Short Hills, New Jersey
July 21, 1992

/s/

Sandra J. Meckler, Esq.
IMPARTIAL CHAIRMAN

Mary Uhle, EMPLOYEE PANEL MEMBER,

concurring in part and dissenting in part:

I agree with the foregoing opinion with respect to Charge I insofar as I find that Respondent engaged in conduct unbecoming a teacher by performing the Binaca experiment in a lunchroom setting. This action showed poor judgment and undermined his position as a role model for the students. Nevertheless, Respondent's action was not so grave as to constitute "misconduct" or "neglect of duty" within my understanding of those terms.

Regarding Charge II, I find that Respondent is guilty of misconduct and conduct unbecoming a teacher, since his testimony established that, in performing the experiment for a second time, he knew he was doing something he should not. I cannot agree to a finding of insubordination, however, since the administration had not issued him a written directive by the time of the second experiment. Without a clear written directive regarding the administration's position, a finding of insubordination cannot be substantiated. Nor do I believe that in doing the experiment for a second time, Respondent's actions rose to the level of "neglect of duty."

Dated: Brewster, New York
July 24, 1992

/s/

Mary Uhle
EMPLOYEE PANEL MEMBER

Mr. Dennis Geisler, BOARD PANEL MEMBER,

concurring:

I concur in all respects with the Opinion, Determination, and Recommendation of the Impartial Chairman.

Dated: Hyde Park, New York
July 24, 1992

/s/

Dennis Geisler
BOARD PANEL MEMBER

STATE OF NEW YORK
STATE EDUCATION DEPARTMENT
SCHOOL DISTRICT EMPLOYEE-EMPLOYER RELATIONS UNIT

In the Matter of
TUXEDO UNION FREE SCHOOL DISTRICT, TUXEDO HIGH SCHOOL,
Complainant,

Against

BRIAN T. CULLEN,
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MR. DENNIS GEISLER, BOARD PANEL MEMBER
MS. MARY E. UHLE, EMPLOYEE PANEL MEMBER

APPEARANCES:
FOR THE TUXEDO UNION FREE SCHOOL DISTRICT:
SHAW & SILVEIRA, ESQS., BY: DAVID S. SHAW, OF COUNSEL FOR THE RESPONDENT, BRIAN T. CULLEN:
JAMES R. SANDNER, ESQ., BY: PAUL JANIS, ESQ.

OPINION OF THE PANEL

Background

On July 28, 1992, the Chairman issued an Opinion finding Respondent guilty of misconduct, conduct unbecoming a teacher, neglect of duty, and insubordination with respect to charges filed by

the Tuxedo Union Free School District ("District"). The charges stemmed from a demonstration involving a cigarette lighter and "Binaca" breath spray which was performed by Respondent on two occasions in the course of his duties as an elementary school cafeteria supervisor. The Board panel member concurred in the Opinion in all respects, and the Employee panel member concurred in part and dissented in part.

It now remains for the panel to assess the appropriate penalty. In so doing, the panel has taken into account Respondent's prior disciplinary record. Specifically, Respondent was found guilty of a charge arising from an incident on November 5, 1989, in which he took his students on an airplane trip to perform physics experiments, in violation of established policy. Believing the fine "should only be large enough to underline the seriousness of the violation and as a deterrent to any further gross violation . . . of District policies", the panel there recommended a fine of $1,259, which was implemented by the School District Board on March 21, 1991.

Unfortunately, this fine did not have its desired effect, since less than ten months later, Respondent performed the demonstration in the lunchroom after being instructed not to do so because of the safety hazards involved. Aside from exercising poor judgment in performing the experiment in the first instance, Respondent reaffirmed the perception that he feels free to disregard certain directives of the District.

In deciding upon our recommendation, we considered the District's arguments that termination is the appropriate penalty in this matter. As the Union pointed out, however, Respondent has been a high school science teacher for twenty years and the incidents involved here did not involve his actual teaching duties. Yet, we are charged with the duty of recommending a penalty that will act as a deterrent to the improper conduct. After taking all factors into consideration, we find that neither a fine nor discharge are appropriate. Rather, we recommend that Respondent be suspended for four months without pay.

Accordingly, we make the following Determination and

RECOMMENDATIONS:

1. Respondent Brian T. Cullen is guilty of the charges in accordance with the Chairman's Opinion dated July 25, 1992.

2. Respondent should be suspended for four months without pay.

Dated:

October 26, 1992

/s/

Sandra J. Meckler, Esq.

IMPARTIAL CHAIRMAN

/s/

Dennis Geisler

BOARD PANEL MEMBER

Mary E. Uhle

EMPLOYEE PANEL MEMBER

Accordingly, we make the following Determination and RECOMMENDATIONS:

1. Respondent Brian T. Cullen is guilty of the charges in accordance with the Chairman's Opinion dated July 25, 1992.

2. Respondent should be suspended for four months without pay.

Dated:

October 27, 1992

Sandra J. Meckler, Esq.

IMPARTIAL CHAIRMAN

Dennis Geisler

BOARD PANEL MEMBER

/s/

Mary E. Uhle

EMPLOYEE PANEL MEMBER

STATE OF NEW YORK)
) ss:
COUNTY OF DUTCHESS)

Dennis Geisler, being duly sworn, deposes and says that:

is the Board Mbr. Panelist in a case arising under Section 3020-a of the New York Education Law between the Tuxedo Union Free School District and Brian Cullen, a tenured teacher, and that the above Opinion, Determination and Recommendation and signature are mine.

/s/

/s/
Sworn to me this 22nd day
of October, 1992

Rose F. Mancuso
Notary Public, State of New York
No. 4997633
Residing in Dutchess County
Commission Expires June 15, 1994

STATE OF NEW JERSEY)
) ss:
COUNTY OF ESSEX)

Sandra J. Meckler, being duly sworn, deposes and says that:

She is the Impartial Panelist in a case arising under Section 3020-a of the New York Education Law between the Tuxedo Union Free School District and Brian Cullen, a tenured teacher, and that the above Opinion, Determination and Recommendation and signature are mine.

/s/

October 26, 1992
Sworn to me this day
of October, 1992

Rose Lia
Notary Public of New Jersey
My Commission Expires Aug. 27, 1996

STATE OF NEW YORK)
) ss:
COUNTY OF PUTNAM)

Mary E. Uhle, being duly sworn, deposes and says that:

She is the Employee Panelist in a case arising under Section 3020-a of the New York Education Law between the Tuxedo Union Free School District and Brian Cullen, a tenured teacher, and that the above Opinion, Determination and Recommendation and signature are mine.

/s/

/s/

Sworn to me this 27th day
of October, 1992

Carmella J. Cutrera
Notary Public, State of New York
Qualified in Putnam County
Commission Expires Jan. 31, 1994
4840193

APPENDIX G

Excerpt from Transcript of February 26, 1993 Hearing Before Panel Constituted Pursuant to New York Education Law § 3020-a

* * *

MR. SHAW: If I understand what you're saying, Mr. Isseks, you're asking for the panel to rule on the merits of the constitutional law issue or else indicating you may choose to go to Federal Court at this juncture to have that issue decided; is that what you are saying?

MR.ISSEKS: I am not making that threat.

MR. SHAW: It isn't a threat.

MR. ISSEKS: I do rest upon what was said in the argument, that we do see a major First Amendment violation; and yes, analogous to the matter that I am referring to that has been preliminary enjoined by the District Court, I believe there are grounds to get a preliminary injunction of this proceeding.

However, we have the panel that has the entire issue before it and is prepared to decide that issue once it's been briefed. I would like the opportunity for the panel to do so, rather than put Mr. Cullen through the ordeal of continuing with the 3020-a proceeding any further or forcing his hand to go into the Federal Court. Yes.

Again, it's not a threat, just a statement of what I perceive to be the posture of this proceeding at the present moment.

MR. SHAW: I understand what you have said. I think at this point I have to consult with my client to decide whether or not, essentially, we're willing to allow the merits of the constitutional law argument to be decided by the panel at this juncture with the understanding that should it be decided against the district that's the end of the case before the respondent's case is put on record; if you're following what I said.

MR. ISSEKS: No, I don't understand the import of what you said at all.

MR. SHAW: What I am saying is, under our reading of this regulation the panel chairperson cannot dismiss a case on the merits unless there is a consent from the complainant, Dr. Fliegner, or the attorneys, our firm, if we were to have the panel hear the constitutional law issue, have it briefed and stop the rest of these proceedings pending the determination of the constitutional issue. If their ruling is that there is a constitutional issue which precludes discipline in their view, that would be the end of this proceeding on its merits. That's what we understand your interest in saying stop it now, review the constitutional law issue, come back with a ruling; and if the ruling favors your position, this case is over on the merits.

THE CHAIRMAN OF THE PANEL: Let me suggest this, Mr. Shaw. I think I understand your point. I would suggest that maybe that could be addressed in your brief to us as to the rights of the chairperson and/or the panel to rule on this motion with or without prejudice to you at this point in time. Does that sound, would that allow you to address that question? So we will have the further benefit, Mr. Isseks, as to your reasoning asking that it would be improper for us, as I understand it, to dismiss now without the approval of you or your client.

MR. SHAW: You're one step ahead of what I am suggesting. I would confer with the client right now to see whether or not we were willing to waive, to allow you to proceed to the merits of the constitutional issue.

THE CHAIRMAN OF THE PANEL: Why don't you do that.

Off the record.

(Discussion off the record.)

THE CHAIRMAN OF THE PANEL: Back on the record.

MR. SHAW: I have consulted with Dr. Fliegner, who is the complainant in this case, and the district is willing, within the meaning of regulation 82.10 e, to allow the chair to determine

whether or not the case should be dismissed based upon the constitutional law claim of respondent's counsel, that meaning not only without prejudice but with prejudice should it go to the merits of the case having heard the district's prima facie case. We would be willing to abide by whatever the ruling is.

So at this point we're ready to submit briefs on a date set. We're also ready, if respondent wishes to present any witnesses, to have those witnesses go forward.

THE CHAIRMAN OF THE PANEL: Thank you, Mr. Shaw.

Let me reiterate my understanding. I have read 82.10 e since you raised it and I understand your argument. However, as I indicated, in a recent prior case when a motion to dismiss was raised it was decided by the entire panel, I think with some reference to case law which indicated that it would be the entire panel that would decide that. So at this point in time I am going to ask for the briefing of this, perhaps on this point as well, whether or not it's the chairperson alone or the entire panel, in spite of what 82.10 e says.

MR. SHAW: We would join with respondent's counsel in a stipulation for our purposes and this hearing that it can be the entire panel.

THE CHAIRMAN OF THE PANEL: I am sorry?

MR. SHAW: I didn't make that clear, but we're certainly willing to do that.

MR. ISSEKS: Stipulate that the entire panel decide the motion?

MR. SHAW: Yes.

MR. ISSEKS: Of course.

THE CHAIRMAN OF THE PANEL: I am sorry, the way you phrased your presentation I thought it was just the chairman.

MR. SHAW: I did say that. That was what it is in the agreement. I wasn't aware there would be a stipulation.

THE CHAIRMAN OF THE PANEL: Okay. Let's go off the record for a minute so we can talk about time frames in terms of the briefs and decision making.

Off the record.

THE CHAIRMAN OF THE PANEL: Back on the record.

After further discussion among the panel members and attorneys for plaintiff, the plaintiff district, and respondent teacher, it has been agreed that the attorney will prepare briefs to be filed, to be placed in the mail March 26th; that the panel will then consider, review the briefs and will deliberate during the week of April 12th; and that the chairperson will inform the attorneys for the complainant district and respondent teacher no later than Friday April 16th by telephone of the decision of the panel whether or not to dismiss or deny the motion to dismiss; and, in any event, we have scheduled a hearing which may just be to wind up and formalize the motion, the granting of the motion to dismiss or the continuation of the case, on April 22nd, at 10:00 a.m.; and that hearing will be here.

MR. SHAW: If not this building somewhere in this park.

THE CHAIRMAN OF THE PANEL: The district will inform the parties during the week of April 12th as to the location of the hearing on April 22nd.

It was also confirmed in discussions off the record that the matter to be briefed and the subject matter of the motion to dismiss will be limited to the question of the denial of the constitutional rights by the complainant district with respect to the complaint, to the charges against him.

Does anybody have any question about my statement, that statement or the procedure and the dates?

MR. ISSEKS: No.

THE CHAIRMAN OF THE PANEL: If not, this hearing is adjourned until April 22nd.

(Whereupon, at 3:50 o'clock p.m., the proceedings were adjourned to April 22, 1993, at 10:00 o'clock a.m.)

APPENDIX H

Decision of the Commissioner of the New York State Education Department, dated May 5, 1994

THE UNIVERSITY OF THE STATE OF NEW YORK
[Letterhead]

The State Education Department

Before the Commissioner

Appeal of the BOARD OF EDUCATION OF THE TUXEDO UNION FREE SCHOOL DISTRICT from a determination of a § 3020-a hearing panel concerning charges against Brian T. Cullen, a tenured teacher.

Shaw & Silveira, Esqs., attorneys for petitioner, David S. Shaw and Jay M. Siegel, Esqs., of counsel

Robert N. Isseks, Esq., attorney for respondent

Petitioner, the Board of Education of the Tuxedo Union Free School District, appeals the determination of a hearing panel convened pursuant to Education Law § 3020-a which found respondent guilty of misconduct, conduct unbecoming a teacher, neglect of duty and insubordination, and authorized his suspension without pay for four months. Petitioner seeks to terminate respondent's services. The appeal must be sustained in part.

Respondent is a tenured high school science teacher in the Tuxedo district. On February 13, 1992, petitioner found probable cause to prefer charges against respondent:

CHARGE I MISCONDUCT AND/OR CONDUCT UNBECOMING AND/OR NEGLECT OF DUTY AND/OR INCOMPETENCE AND/OR INSUBORDINATION

In that on or about December 4, 1991, Mr. Brian Cullen, a tenured teacher, while in the high school cafeteria during the fifth period, in the presence of upper elementary grade level students, ignited an aerosol spray creating a flame-thrower type effect.

In the event of a finding of guilt on the above-stated charge, the teacher's prior disciplinary record, if any, shall be introduced for the Section 3020-a Panel's consideration in determining the appropriate discipline.

CHARGE II MISCONDUCT AND/OR CONDUCT UNBECOMING AND/OR NEGLECT OF DUTY AND/OR INCOMPETENCE AND/OR INSUBORDINATION

In that on or about January 17, 1992, Mr. Brian Cullen, a tenured teacher, while in the high school cafeteria during the fifth period, in the presence of elementary grade level students, ignited an aerosol spray creating a flame-thrower type effect. This conduct was undertaken after receiving a directive from Elementary School Principal, Jan Hammond, not to repeat the flame igniting activity which occurred on or about December 4, 1991.

In the event of a finding of guilt on the above-stated charge, the teacher's prior disciplinary record, if any, shall be introduced for the Section 3020-a Panel's consideration in determining the appropriate discipline.

A hearing was conducted on May 28, 1992 at which the parties stipulated as follows:

> On December 4, 1991 and January 17, 1992, the Respondent held a cigarette lighter in an open position and pumped a single spray from a two ounce Binaca breath spray which ignited for less than one second. This demonstration was conducted in the high school cafeteria before fourth, fifth, and sixth grade students while Mr. Cullen was serving as cafeteria supervisor, for which he was compensated $20 per day, pursuant to a provision in the collectively negotiated agreement between the Teacher's Association and the District.

In a decision dated July 21, 1992, the panel found respondent guilty of misconduct, conduct unbecoming a teacher and neglect of duty in connection with Charge I; and guilty of misconduct, conduct becoming a teacher, neglect of duty and insubordination with respect to Charge II. The panel then scheduled another hearing to determine the appropriate penalty.

On September 1, 1992, the panel reconvened to hear argument regarding penalty. Petitioner presented for the panel's consideration the March 11, 1991 determination of a panel in a prior disciplinary proceeding against respondent. That prior determination indicated that respondent had been found guilty of one charge of insubordination, conduct unbecoming a teacher and incompetency by failing to adhere to a directive that he not take high school Physics students on a small aircraft to conduct a zero gravity experiment. The prior panel imposed a fine of $1,250. In a decision dated October 26, 1992, the current panel took into account the prior finding of guilt against respondent and imposed a suspension without pay for four months. This appeal ensued.

Before addressing the merits of this appeal, I must address two procedural issues. In the memoranda of law submitted by both petitioner and respondent, the parties seek to introduce evidence that was not before the panel and was not set forth in any pleading. A memorandum of law may not be used to belatedly add assertions or exhibits which are not part of the record (*Appeal of Albert, et al.*, 32 Ed Dept Rep 615; *Appeal of Johnson*, 26 *id.* 42; *Matter of Bd. of Ed., Broadalbin CSD*, 24 *id.* 51). Accordingly, such new

exhibits will not be considered in this appeal. Respondent has also recently submitted two documents relating to a separate action between the parties in federal court. Since that federal action does not involve the issues in this case, I will not consider those submissions in my review of this matter.

Neither party to this appeal challenges the panel's findings of guilt. Accordingly, the sole issue for review is whether the penalty recommended by the panel is appropriate. Petitioner contends that it is too lenient, while respondent contends it is appropriate. As Commissioner, I may substitute my judgment for that of the hearing panel regarding the penalty imposed (*Matter of Mockler v. Ambach, et al.*, 79 AD2d 745, lv to app den 53 NY2d 603; *Matter of Kloepfer v. Commissioner, et al.*, 82 AD2d 974, affd 56 NY2d 687; *Matter of Shurgin v. Ambach*, 83 AD2d 665, affd 56 NY2d 700). In determining whether to substitute my judgment for that of the panel, I must review the measure of discipline imposed and determine whether it is proportionate to the offense.

Based on the record before me, I find that the penalty recommended by the panel is too lenient. Respondent argues that his action of twice holding a cigarette lighter in an open position and pumping a short spray from a breath spray container was not dangerous conduct. However, that argument ignores the fact that such action occurred outside of the context of legitimate class instruction and was performed before impressionable elementary school children. Respondent's conduct could easily have resulted in a young child attempting to copy respondent's act, with potentially serious consequences. This act, coupled with his prior action of taking students on an unauthorized airplane ride, indicates a pattern of irresponsible conduct with students.

Moreover, the instant matter and the incident regarding the airplane ride both involve actions taken by respondent after he had been specifically directed by district supervisors not to take such actions. The record of this appeal, therefore, also indicates a pattern of insubordination by petitioner. Repeated insubordination is "likely to undermine the discipline necessary for the operation of a sound school system" (*Matter of Bd. of Ed., Duanesburg CSD*, 18 Ed

Dept Rep 387; *Matter of Mockler v. Ambach, et al., supra*; *Appeal of Bd. of Ed., Uniondale UFSD*, 26 *id.* 498).

While I find respondent's conduct irresponsible and insubordinate and am not satisfied that respondent has acknowledged that his conduct in this and the prior matter was unjustified, termination of his employment is not warranted. Rather, a penalty must be imposed which is sufficient to impress upon respondent that his irresponsible and insubordinate behavior is unacceptable and must not continue. Accordingly, I find that the appropriate penalty is a one-year suspension without pay. In calculating the period of suspension, petitioner must take into account any period of suspension without pay already served by respondent.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that such portion of the decision of the hearing panel which recommended that respondent be suspended without pay for four months be, and the same hereby is, annulled.

IT IS FURTHER ORDERED that petitioner be, and hereby is, authorized to suspend respondent without pay for a period of one year, to include the period of suspension which respondent may have already served pursuant to the hearing panel's decision.

[Seal]

IN WITNESS WHEREOF, I, Thomas Sobol, Commissioner of Education of the State of New York, for and on behalf of the State Education Department, do hereunto set my hand and affix the seal of the State Education Department, at the City of Albany, this 5th day of May, 1994.

/s/ Thomas Sobol
Commissioner of Education